

(25,459)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 629.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,  
PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print
Caption .....	a	1
Transcript of record from the district court of the United States for the northern district of Illinois.....	a	1
Placita .....	1	1
Declaration .....	2	2
Plea of general issue.....	4	3
Verdict .....	5	4
Judgment .....	5	4
Bill of exceptions.....	6	5
Motion to instruct the jury, etc.....	8	7
Testimony of F. J. Roche.....	8	7
Walter G. Mellinger.....	13	10
H. H. Wilson.....	14	11
A. I. Fenner.....	18	15
W. C. Donichay.....	21	17
C. E. Smith.....	23	18
F. Fallon .....	24	19

Testimony of Thomas Donahoe .....	24	20
J. C. O'Brien .....	26	21
Thomas Donahoe (recalled) .....	27	22
William Burroughs .....	28	23
Lloyd T. Warner .....	29	23
A. C. Johnston .....	31	25
M. H. McCune .....	32	26
John O'Brien .....	33	27
Thomas Donahoe (recalled) .....	34	27
F. J. Roche .....	35	28
H. M. Elcholtz .....	36	29
Motion to instruct the jury, etc. ....	36	29
Instructions to jury .....	37	29
Motion for new trial .....	39	31
Judge's certificate .....	40	32
Prayer for reversal .....	41	33
Petition for writ of error .....	42	34
Assignment of errors .....	43	35
Order of July 24, 1915, allowing writ of error, etc. ....	47	38
Bond on writ of error .....	47	38
Præcipe for record .....	49	39
Writ of error .....	50	40
Certificate of clerk .....	51	41
Citation and service .....	52	41
Clerk's certificate .....	53	42
Appearances .....	54	42
Order setting case for hearing .....	56	44
Order of argument and submission .....	57	44
Opinion, Alschuler, J. ....	58	45
Judgment .....	63	49
Order overruling petition for rehearing .....	64	50
Notice and motion to stay mandate, etc. ....	65	50
Order staying mandate .....	68	52
Clerk's certificate .....	69	53
Writ of certiorari .....	70	53

a In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1914.

No. 2294.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Mr. William G. Wheeler, Counsel for Plaintiff in Error.  
Mr. Charles F. Clyne, Counsel for Defendant in Error.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

1 *Placita.*

Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court-room, in the City of Chicago, in said District and Division, before the Hon. Kenesaw M. Landis, United States District Judge for the Northern District of Illinois, on Wednesday, the thirtieth day of June, being one of the days of the June Term of said Court, begun Monday, the seventh day thereof, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States of America the one hundred and thirty-ninth year.

Present:

Honorable Kenesaw M. Landis, Judge of said Court, presiding.  
John J. Bradley, United States Marshal for said District and  
T. C. MacMillan, Clerk of said Court.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

31454.

UNITED STATES OF AMERICA

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Be It Remembered, That heretofore to-wit: on the thirtieth day of December, 1913, came the plaintiff in the above entitled cause by the United States Attorney for the Northern District of Illinois, and

filed in the Clerk's office of said Court its certain Declaration in words and figures following to-wit:

2

*Declaration.*

Filed Dec. 13, 1913.

Declaration.

UNITED STATES OF AMERICA,  
*Northern District of Illinois, Eastern Division:*

In the District Court Thereof, February Term, A. D. 1913.

No. 31454. D. of A. No. 4950.

UNITED STATES OF AMERICA

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

The United States of America, plaintiff, by James H. Wilkerson, its attorney, for the Northern District of Illinois, complains of the Chicago and North Western Railway Company, a corporation common carrier, organized and existing under and by virtue of the laws of the states of Illinois and Wisconsin, defendant, of a plea that it render unto the said plaintiff the sum of five hundred dollars, which the said defendant owes to the said plaintiff and unjustly detains from it;

3 For That Whereas, the said defendant, before and on the 4th, 5th and 6th days of October, A. D. 1913, was a railroad company within the United States, whose road then formed a line of road over which cattle, sheep and swine and other animals were then conveyed from one state of the United States to another state thereof, to-wit, from the state of Iowa to the state of Illinois, and that the said defendant, on the said dates, to wit, the 4th, 5th and 6th days of October, A. D. 1913, did knowingly and wilfully confine a certain consignment of animals, to-wit, one hundred and thirty-one hogs, consigned by Jens Hendricksen, Ringsted, Iowa, to W. Gentleman & Sons, Chicago, Illinois (which said animals were then being conveyed by the said defendant on its line of road from Ringsted in the state of Iowa to Chicago in the state of Illinois) in car numbered, to wit: C. & N. W. 4999, for a longer period than thirty-six consecutive hours, to-wit: thirty-nine hours and five minutes, without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, or for any period whatever, and which said animals were not then and there carried in cars in which they could and did have proper food, water, space and opportunity for rest; and that the said defendant was not then and there prevented from so unloading the

said animals by storm or other accidental or inevitable causes, which could not have been anticipated or avoided by the exercise of due diligence and foresight; contrary to the form of the said statute in such case made and provided; by means whereof, and by force of the said statute, the said defendant forfeited and became liable to pay to the said plaintiff to demand and have of the said defendant, the sum of five hundred dollars.

Yet the defendant, though requested, has not paid to the plaintiff the said sum above mentioned amounting to five hundred dollars, or any part thereof, but refuses so to do; to the damage of the plaintiff of five hundred dollars, and therefore it brings its suit, etc.

J. H. WILKERSON,  
*United States Attorney,  
Attorney for Plaintiff.*

(Endorsed:) Filed Dec. 30, 1913, T. C. MacMillan, Clerk.

And afterwards to-wit: on the fifth day of January, 1914, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain Plea of General Issue in words and figures following to-wit:

4

*Plea.*

Filed Jan. 5, 1914.

Plea of General Issue.

UNITED STATES OF AMERICA,  
*Northern District of Illinois, Eastern Division, ss:*

In the District Court Thereof.

No. 31454. D. of A. No. 4950.

UNITED STATES OF AMERICA

VS.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Now comes the defendant Chicago and North Western Railway Company, by Irving Herriott and Ira C. Belden, its Attorneys, and William G. Wheeler, its counsel, and defends the wrong and injury, when etc., and as to the plaintiff's declaration filed herein says that it is not guilty of the said supposed grievances therein laid to its charge, or any or either of them, in manner and form as the plaintiff hath therein complained against it, and that it does not owe the plaintiff the sum of money mentioned in said declaration, or any part

thereof, and of this the said defendant puts itself upon the country, etc.

CHICAGO AND NORTHWESTERN  
RAILWAY COMPANY,  
By IRVING HERRIOTT &  
IRA C. BELDEN,  
*Its Attorneys.*

WILLIAM G. WHEELER,  
*Of Counsel.*

(Endorsed:) Filed Jan. 5, 1914, T. C. MacMillan, Clerk.

And on to-wit: the seventh day of November, 1914, there was filed in the clerk's office of said Court in said entitled cause a certain Verdict in words and figures following to-wit:

5

*Verdict and Judgment.*

Verdict.

No. 31454.

UNITED STATES OF AMERICA

VS.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

We, the Jury find the defendant guilty, as charged in the Declaration.

1. FRANK J. BOYCE.
2. A. S. MANNASSAN.
3. ALBERT C. CHURCH.
4. PETER A. BOUCHELLE.
5. BERNARD J. MALLOY.
6. JAMES R. FERSON.
7. CHAS. SCHUMUHL.
8. FRED KUEBKER.
9. HENRY COHEN.
10. EDWD. SCHUBEL.
11. J. F. ALMQUIST.
12. B. E. SIMMONS.

(Endorsed:) Filed Nov. 7, 1914, T. C. MacMillan, Clerk.

And on to-wit: the thirtieth day of June, 1915, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, Judge of said Court, appears the following entry to-wit:

31454.

UNITED STATES OF AMERICA

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

This cause having heretofore been submitted to the Court for trial, and the court having considered and being now fully advised in the premises finds that there is due from the defendant to the plaintiff the sum of one hundred dollars (\$100).

It is therefore considered and adjudged by the Court that the plaintiff, the United States do have and recover of and from the defendant, Chicago and Northwestern Railway Company, said sum of one hundred dollars, so found to be due, together with the costs in this behalf expended for which let execution issue.

And on to-wit: the twenty-fourth day of July, 1915, there was filed in the clerk's office of said Court in said entitled cause a certain Bill of Exceptions in words and figures following to-wit:

6

*Bill of Exceptions.*

Filed July 24, 1915.

Bill of Exceptions.

In the United States District Court, Northern District of Illinois,  
Eastern Division.

No. 31454.

UNITED STATES OF AMERICA

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Bill of Exceptions.

Be It Remembered, that heretofore on towit at the trial of the above entitled cause before the Honorable Kenesaw Mountain Landis, one of the Judges of the United States District Court, and a jury, on the 5th and 6th days of November, A. D., 1914, at the regular November, 1914, Term of said Court, the Government to maintain the issues on its behalf introduced and offered the following evidence:

Appearances:

Mr. Frederick Dickinson, and

Mr. F. L. Igoe, Appearing on behalf of the United States,

Mr. William G. Wheeler, and

Mr. Ira C. Belden, Appearing on behalf of the Defendant.

Mr. Igoe: This is case Number 31454, your Honor, and there are seven others which involve the same state of facts, and we have an agreement that we shall try the first case, 31454—we will waive a jury in the succeeding seven, and agree that the same judgment shall be entered in the succeeding seven as is finally entered in this case. Of course, if it becomes necessary, or if it should be concluded to be advisable to go to the Court of Appeals, we would like to have the judgment in the seven cases, await the final decision in this case. That is, whatever judgment is to be entered in this case is the final judgment in the other cases.

7 The Court: The proposition is when you are trying one case to try eight?

Mr. Igoe: Yes, sir.

Mr. Wheeler: That is agreeable.

Mr. Dickinson: The Government will now call on the defendant to produce the documents which were called for.

Mr. Wheeler: The defendant admits that the stock in question was loaded at six-thirty in the evening; that it was unloaded at 9:05 o'clock in the morning, 39 hours and 5 minutes after the time it was loaded, and it has produced to the District Attorney now the document for which he is calling.

Mr. Dickinson: And that it was a shipment involved in the transmission of Interstate Commerce at the time?

Mr. Wheeler: Why, yes, you have the instruments right in your hands.

Mr. Dickinson: Then we will offer in evidence, if the Court please, the way bill for live stock from Ringsted, Iowa, to the Union Stock Yards, Chicago, showing the time of unloading of the stock, and also what is called a wideawake report of the Chicago and North Western Railway Company, Galena Division, which shows the time of unloading, and also the thirty-six hours' request executed by the shipper and attached to the way-bill, and ask that they be marked "Government's Exhibits respectively 1, 2 and 3."

The way-bill was marked "Government's Exhibit 1," the Thirty-six hour request was marked "Government's Exhibit 2"; the wide-awake report was marked "Government's Exhibit 3." The said Government's Exhibits 1, 2 and 3 are hereto attached, and made a part hereof.

Mr. Dickinson: That makes the Government's case.

And thereupon the Government rested its case.

Mr. Wheeler: I make the same motion that I did in the other case, which I do not care to argue, the motion to direct a verdict.

And thereupon the defendant presented to the Court the following motion in writing:

*Motion.*

UNITED STATES OF AMERICA

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

And now comes the defendant, the Chicago and North Western Railway Company, by William G. Wheeler, its attorney, at the close of the plaintiff's evidence in the above entitled cause, and moves the Court to give to the jury the following instruction:

"The Court instructs the jury to find the defendant not guilty," and the said defendant herewith tenders to the Court a written instruction to that effect, separate and apart from any other instruction tendered in said cause and asks the Court to read the same to the jury.

WILLIAM G. WHEELER,  
*Attorney for Defendant.*

And the defendant handed to the Court the following instruction: "The Court instructs the jury to find the defendant not guilty."

And thereupon the Court overruled and denied said motion of the defendant to direct the jury to find the defendant not guilty, and refused to give said instruction to the jury; to which ruling of the Court in so denying said motion and so refusing to give said instruction, the defendant by its counsel then and there duly excepted.

And thereupon the defendant to maintain the issues on its part offered the following testimony:

*Testimony of F. J. Roche.*

F. J. ROCHE, called as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. Wheeler:

My name is F. J. Roche; I live at Elmhurst, Illinois, and am a freight conductor with the North Western, and have been a conductor eight years, and have been employed by the defendant thirteen years.

On October 5, 1913, I was running between Clinton, and Chicago.

I took a train out of Clinton on the evening of October 5th, extra 1733, leaving Clinton at six o'clock p. m. In that train was C. & N. W. car Number 4999. After we left Clinton we picked up some cars at Nelson on the way, among them, C. & N. W. car 21239. At that time the schedule time between Clinton, Iowa, and Union Stock Yards was nine hours. We left Clinton at six o'clock in the evening and without being subjected to any delays except delays for coal and water, and the delays on account of scheduled

stops, and without increasing the speed of the train, I have made the run from Clinton to the Union Stock Yards in about six hours.

On that evening I made a passing inspection of the cars in my train as the train pulled by me at each point where it was possible for me to be up at the head end of the train. That inspection was made by just standing close to the train and watching it. The running gear and draft rigging and such things as that as the train pulled by. When I speak of draft rigging, I include draw bars. I think I made three or four such inspections between Clinton and Proviso, on that evening. I did it whenever I had a chance to get near the head end. My brakeman also made inspections of the same kind.

We reached Proviso at 2:48 a. m.; while the train was running along, a draw bar came out, causing the train to make a stop there and de-railing one car. At the time the draw bar pulled out the train was moving in the usual way towards Chicago, running right along at the time. There was no unusual jolt or movement or improper working of the engine so far as I could discover, nor no improper application of the air, nor anything to cause an unusual strain upon that car at that time. There had been no improper handling of the train at any point between Clinton and Proviso while in my charge. The train was in my charge all the time between Clinton and Proviso, but these cars were picked up at Nelson. We pulled out at 2:48 a. m. and the pair of trucks on one car was derailed. We were not able to re-rail the trucks of car, but notified the Yard Master, who ordered the wrecker and re-railed the car at 5:35 a. m. We moved forward again at 5:40 a. m. We moved as soon as we were able to after the car was re-railed.

By the draw-bar I mean the coupler which couples the two cars together. It is a long piece of iron that extends underneath the car and is bolted to what are known as draft timbers. I should say that piece of iron is four feet long and on one end of it is the coupler.

10 We made the usual inspection of the draw bar for the purpose of determining the cause of its pulling out. We examined the draw bar to see what caused the derailment, to see where it came from. We were not able to determine what caused the draw bar to pull out any more than finding the bolts broken. I refer to the bolt of the draft iron and draft timber. By draft iron I mean the draw bar.

I took that train as far as California Avenue, where I was relieved. When I left the train at California Avenue there was included as one of the cars of the train M. & St. L. car 34263.

#### Cross-examination by Mr. Dickinson:

I have been in the employ of the North Western Road for thirteen years, eight years as conductor and five years as brakeman. When I stand where I inspect the train it is as the train is starting up, gradually growing faster as you approach the rear of the train. You can examine all draft rigging and brake rigging that is running with the

cars sufficiently to see if anything is out of place. The train at that time is very seldom going any faster than you can walk. There were forty-nine cars in this train, and as an experienced railroad man I think I could make an examination of the draft mechanisms on each one of these cars sufficiently to be of value; not on all of them, but on the part of the train I passed over,—about half I should say. One man generally starts at the hind end and the other man from the head end. I examined only about half of the train. I don't know what happened to the other half of the train. I examined the rear half, and at that time was standing about six feet from the train. We generally bend down and hold our lights up under the car where we can see under. The last inspection that I made of the head end of the train was back at Nelson as the pick-up point. I don't think I inspected the full train at any other place. The last inspection at the rear end was at West Chicago about 1:30 a. m. I made the inspection when the train left Nelson, the coal and water station, at 8:30 at night. It was dark at that time and at all times when we made our inspections, and we had to use our lanterns.

I certainly think it is possible as an experienced railroad man to determine whether there is any defect existing in reference to any of the parts of the mechanism of a train of that sort of the portion which

11 I inspected. I have discovered defects in so brief a time a good many times. Draw bars partially pulled out, brake rigging down, flat wheels, and any defects like that. I didn't see the particular car in question except at Nelson where the car was picked up. If we had known that the car was in bad order it would have been reasonable to have broken that train at Proviso and taken the bad car out, but we didn't know it at that time. We were proceeding to Chicago, supposing the car was o. k., when the car became — bad order. We had no intention of stopping at Proviso, and the cars that the draw bars came out of were left at Proviso. There was no way to move the train any quicker. It could have been taken back to the last town, I suppose, if preparations were made that way. It is customary in railroad practice to re-rail trains without calling the steam wrecker if possible, but that was not possible in this case, because of the distance that the car was from the track. It was almost square across from the two mains, if I remember it rightly. At the time the derailment occurred the train was moving at about thirty miles an hour. That is sufficiently fast to completely put a car at right angles with the right of way. Even five miles an hour will do it. I said I thought both bolts were broken. I don't know why the draw bar come out or what caused it. Possibly the broken bolts had something to do with the draw bar coming out. I don't remember which bolts it was now, whether it is the ones which hold the draft timbers together or the draft timbers to the car. They were about one inch bolts. I don't know exactly. I didn't count how many were broken. I never counted them. That is not our work.

Redirect examination by Mr. Wheeler:

There are unloading yards between Clinton and Union Stock Yards at La Fox and Rochelle. These towns are west of Proviso.

The head brakeman assisted me in making the inspection of the train in each case. His name was James McCarthy. I don't know whether he is *is* in service now or not. He was a short time ago. I saw this car in question at Nelson, and I believe that was the last time I inspected it. I won't say I made an inspection after that, but it is possible that I did. I did inspect it at Nelson before the car was moved and I discovered nothing at that time out of the way with the car. Nelson is ninety-one miles west of Proviso. I know that the head brakeman makes inspection of those cars. I know that the head brakeman made these inspections on the night in question. I know that he came back along the train. You can see a man with a light coming along the train looking over cars. That is what I supposed he done.

I do not know on the night in question that the head brakeman made the inspection. I couldn't say that he did. I could see him coming along with the lamp, but as to say what he was doing any more than it is his duty to do that I couldn't say.

The Court: Strike out the observation as to the head brakeman.

It is the brakeman's duty to inspect the train for defects in any way in draft rigging, running gear, or for hot boxes. At the time that I saw this brakeman coming down with the light, it was his duty to inspect the train.

Recross-examination by Mr. Dickinson:

The brakeman and I probably met in the inspection of the train. It is usual—I wouldn't swear that I met him at each stopping point that night, but it is usual for us to meet in the middle of the train. He began to make his inspection of the train from the engine, and I was at the rear end and we gradually approached each other. We make that inspection standing, and then he starts back and I inspect as much of the rear portion as I can standing, and the balance is inspected as the train is moving, and that is what I mean when I say that he was inspecting the train; that I saw him approaching me with a lantern in his hand. As to whether he was looking at the train at the time I can't see that far in the darkness.

Mr. Wheeler: Now, your Honor, I will state that we are unable to produce the head brakeman, because we cannot locate him. He is out of the service of the Company, and if that question is disputed I will prove the facts. What do you say?

Mr. Dickinson: No objection.

13

*Testimony of Walter G. Mellinger.*

WALTER G. MELLINGER, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is Walter G. Mellinger. I am brakeman for Chicago and North Western Railroad for two years and a half. On October

6, 1913, I was brakeman for Mr. F. J. Roche, coming from Clinton to the Union Stock Yards, Train Number 114, extra 1733. If a train is an extra it just has the number of the engine. 114 is the regular number. I couldn't say for sure whether this was 114. We left about that time.

When we got to Proviso we pulled out a draw bar. I went up and looked at it, and one car was off the track almost crossways of the rails. It was about half an hour after the train stopped that I saw this car across the track. I just looked at the draw bar and that was all. I didn't see the draw bar, I just looked at the cars that was off the track. When the draw bar was pulled I was in the caboose. The first intimation I had that there had been an accident — when we stopped a sudden stop. I was in the caboose. Before that stop we were running along nice and smooth. There had been no jerks that I know of.

Cross-examination by Mr. Dickinson:

I saw the car that the draw bar was pulled out. It was on the west end. I am not sure. I couldn't tell you the number. The car was at less than a right angle across the track.

It was pointed east. The track runs east at that point. The car that was off was headed south east, and the draw bar that was pulled out was at the west end of the car ahead of it. There was no draw bar at all pulled out in the car that was across the track, and it was that car that was ahead of the one that was across the track that the draw bar was pulled from. I didn't see the draw bar. I just saw the car, so all I know is that there was a car across the track in a southeasterly direction. I said the car was put in that condition by virtue of the pulling out of the draw bar, because I have seen it. I don't know that fact, except from what I saw.

14

*Testimony of H. H. Wilson.*

H. H. WILSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is H. H. Wilson. I live at 203 North Cuyler Avenue, Chicago, Illinois. I am a locomotive engineer, and have been for seven years. I was employed by the Chicago and North Western Railroad on October 6th, 1913, and on the previous evening took a train out of Clinton for the Union Stock Yards. I left Clinton on October 5th with an extra train with engine 1733. The conductor was Roche. These extra trains are known by the conductor and the engine, so I would speak of it as Extra 1733, Conductor Roche. 1733 is the number of the engine. We left Clinton at 6:05, my report shows, and ran the train 136 miles to 40th Avenue, Chicago, Illinois, east of Proviso. From Clinton to 40th Avenue I ran the train and operated the engine in the usual way. We left Clinton at 6:05 and

we stopped at Nelson and got coal and water and the next stop may have been Ashton, or we may have went to Malta, it all depends on the weather conditions that night. At Malta we stopped and got water again, then we would go from there to West Chicago and get water and coal, and the next stop would be 40th Avenue. That is all. On that night we stopped at West Chicago, and at Proviso our train stopped by the air setting automatically.

Q. You may state how you operated that train that night as compared with the way in which it was usually operated.

A. No different.

Mr. Dickinson: I object to that, if the Court please.

The Court: Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.)

(Witness continues:)

I know how an engine should be operated in order to be operated properly when it is attached to a train of cars. All stops should be made with a service position of the air and in running an engine and in going over hills, when you have got to give it more steam, you do that with the reverse lever. It should be let down gradually. This was all done on that evening.

Mr. Dickinson: I object to that and move that the answer be stricken out as to what was done on that evening, because it is not responsive to the question.

15 The Court: Strike out that part of it that is not responsive.

(Witness continues:)

I made all stops gradually and started from all stops gradually as required, and I did every other thing necessary in connection with the movement of the engine.

Mr. Dickinson: I move to strike out "as required."

The Court: Strike it out.

(Witnesses continues:)

When a drawbar pulls out it parts all the air hose which causes the air to set automatically on all cars or the engine that are in the train, and causes a sudden stoppage on the train. This automatic application of the air occurred at Proviso. I have no record of the time when it occurred, and the train stopped. I ascertained right away what caused the stoppage of the train. I whistled out my flagman and the brakeman ran back to find what was the matter and we blocked both main tracks and we had to send him flagging east on the east bound main — and I went back to the wreck to see what was the matter. I can't say just how far I went back, about four or five car lengths, somewhere along in there. I found that a draw bar was drawn out of one end of the car and another car with the front trucks off the track. This car was at an angle of about 45 degrees across the track. In order to re-rail that car the draft timbers had to be taken up and the draw bar—what was left of it there—taken and removed. That

all had to be taken away before we could lift up the car and put the trucks on the track. We had to have the steam wrecker; it came there. The brakeman sent for it. I should judge we were delayed at that point on account of this derailment about three hours.

Cross-examination by Mr. Dickinson:

I have been in the employ of the North Western for twelve years, seven years as an engineer. I have ran both freight and passenger trains. I have had draw bars pull out before this one. I couldn't tell how many. Not very many in my time though. In my experience we have often been able to re-rail or put a car on the track without the use of the steam wrecker. We could not put this car back on the track without the use of the steam wrecker on account of the timbers being in the way. If the timbers were removed I couldn't say whether we could put it back. The car was at an angle of 45 degrees

16 and the trucks were so far away that you probably wouldn't have been able to get it back as you could the other way. The front trucks were off the track. The rear trucks were on the rail if I remember correctly. I am pretty sure. I believe the front trucks were 45 degrees. It is not usually possible as a method of engineering practice to put those trucks on by some other means than the steam wrecker. We carry no jacks nor lifting apparatus on the engine. We carried them in the way car. I can't state positively what they carried there for the purpose of raising up the car but I know that they had a pair of frogs. We do not carry jacks there. We do carry chains and crowbars. I am willing to state as a result of my experience that it would not have been possible with safety to the stock inside to put this truck back on the rail without the steam wrecker. We would have had to pull it and in pulling that car we might have turned it over. We would pull it to get it back on the track. With the steam wrecker they lifted it right up. You would have to had jacks and several other instruments to get it back after you jacked it up. I don't know how many cattle or hogs were in this car. I can't state whether it was crowded. I know that it was loaded with stock, but I can't say what kind. That is quite awhile ago. It was rather an unusual occurrence to have a car go across the track that way. I know it was loaded, but I can't say whether it was hogs or sheep or cattle. The draw bar was in two or three different places, part of it up there, part of it back a few car lengths. Part of the timbers that support the draw bar, to which the draw bar is attached were down there on the ground on the track. That was all there was to it. The only portion of the car structure that was down on the track was the draw bar and the draw bar timbers, but you must remember that is the whole front of the car. The little platform that is on the front end is included in the timbers that holds the draw bar timbers—and that holds the draw bar and your coupling pin and everything there is on top of it. When that goes down it all goes down. I can't say that the end sills was all gone because the cattle would have got out if that was the case. What was on the track was just the metal and wooden structure underneath the car. The draw bar was in such a position as to cause me to believe that that was what

caused the derailment. I can't say as to the timbers, but I believe that the draw bar caused the derailment. When I saw the draw bar

17 I saw three different pieces of it. One piece was there where the car was derailed and the other piece was back where this car jumped the track. I cannot state now which side of the rail this was on. I got back to this about two minutes after the stop occurred. The brakeman was there first. I can't say as to whether he disturbed the draw bar. He came back and told me then I was back.

We were on time when we started out from Clinton. We were ordered for 5:45 and we left at 6:05 at the depot, so we were 20 minutes late when we left Clinton. I started the train in the usual way without a jerk. I can't say whether we were delayed at any other point along the line before we got to Proviso. I haven't any record to show it. I made no observations of my time sheet at any of these points to see whether I was behind time or not. I remember we picked up some cars at Nelson; that took time; I don't know how long. I looked at my watch every once in awhile to see how we were running. We haven't any schedule time at different points on an extra train, except that we are supposed to start at a certain time and get to a certain place at a certain time, that is all. But in the ordinary running of the train we take time at stations provided we are on a regular run. We mark the time. We make the observations along the road, but we don't have any schedule. I made these observations along the road while I was running this train before I got to Proviso. I don't remember of any delays at all during this trip. We haven't any special time to make up.

We were delayed about three hours at Proviso on account of pulling out of the draw bar. I knew that from the idea of the time we stopped there. I know that we flagged the mail train and the time that my book shows at 40th Street would have to be close to three hours from the time it would take me to go from Proviso to 40th Street. I can't say that I looked at my watch when the train stopped automatically, but I can say that I looked at my watch when I left there, and upon that check and the flagging of the mail train I say that we were three hours late. The mail train is due there around three o'clock. I know we flagged the mail train and it was on time and we sent it around Proviso Yards. I remember that it was on time. It was a few minutes late on account of us delaying it. I do not know its schedule on this ground.

I haven't any time to Nelson to make up. There is no time shown at Nelson at all. We were 20 minutes late leaving Clinton on the time we were ordered out. A train running as an extra train  
18 is running the same as if there was no schedule on the railroad. Now a train is behind time when it is off schedule. Behind or ahead of time when it is off schedule. I can't say now whether we took longer than the schedule of the stock train running between those points. It is too far back. I think we were on time so far as the regular time prescribed for the stock train is concerned at any of the points along the line before we got to Proviso. When we got to Proviso that was not the end of our journey, but 40th Avenue

was, and we were not supposed to get into 40th Avenue on any set time. The ordinary time at that time I believe was nine hours. My time book shows seven o'clock at 40th Avenue, but I arrived there before that. About 6:40 I should judge, or 6:30. That was the end of my trip.

Redirect examination by Mr. Wheeler:

My train was an exclusively stock train that night.

*Testimony of A. I. Fenner.*

A. I. FENNER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is A. I. Fenner. I am wrecking foreman, 40th Street, residence, 540 North Springfield Avenue. I was employed on October 6th, 1913 for the defendant, the Chicago and North Western Railway Company, as a wrecking foreman. I came from Palatine to Proviso and picked up those cars. My wrecking outfit got there about 5:05. I found a stock car derailed and one damaged. I took the numbers of both of them. I have the record of them.

Q. Will you produce it? Just read them.

Mr. Dickinson: I object.

The Court: Objection sustained.

To which ruling of the court, the defendant then and there duly excepted.

(Witness continues:)

I made this entry of this particular car number the next day. That day I had been out all night. I made it when I got in on the morning of October 6th. I think about 8 o'clock in the morning. As soon as I could straighten up things. We got in at seven and  
19 I had my breakfast. I made my entry before I went to bed.

I copied it from my memorandum which I made on the spot at the time I was there. At the time I made that entry in that book I could recollect without the aid of the memorandum what I put in the book. I call direct to mind quite clearly. At that time that I made that entry in that book I could remember all the facts that I entered therein independent of the memorandum. On the numbers I might possibly have to refer to the memorandum. I remember all about the wreck. By reference to the memorandum at the time I was able to say when I made the record in the book that I put in the correct car numbers and other numbers. This is a correct statement of the car numbers, and the other memorandum that I put in it at that time. The numbers of the cars that I re-railed that morning was 20463, Chicago and North Western Railway stock car loaded with stock. I had the number of another car, Chicago and North Western

Railway, 21239. I put that in my memorandum book on account of the damage. The draw bar and draft timbers were pulled out of it. In re-railing the car I took the wire hooks and picked up the end of it and put it on the trucks, put it back on the trucks all right.

We have a steam wrecker that will lift up 100 tons. I got a pair of wire hooks, if anything heavier than the chain hooks, and one book grapples on one corner and the other on the other, and it simply picks it up and straightens it on the trucks. I raised the end of the car. After the end of the car was raised we jointed the truck up first to the body of the car, picked up the end of the car and that raises the truck up and straightens the truck up out on the track. After raising the car up with the trucks attached, we swing the derrick beam if necessary, and then lower it so the trucks drop on the track. When they are in that position we can swing the trucks back into position. The position of the trucks under this car was crosswise of the track it was on. They would either have to jack that car up and have a lot a man——

That car was loaded with stock. The track was cleared for trains to pass at 5:35. The car that was re-railed was switched out and put on the back end of the train, if I remember rightly, I am not sure. The car that had the draw bar out was taken out, I believe. I am not sure, but I think so. I didn't have anything to do with that. I went away. I had all I could do to attend to my own work.

20 Cross-examination by Mr. Dickinson:

I first got my instructions to go to Proviso with the wrecker at 4 A. M., and between that and 5:05 A. M. when I arrived there I was on the road. When I got my instructions to go I was at Palatine, about 42 miles from Proviso. I started immediately with a full crew. We keep a full crew on duty all the time night and day. After we left we went to 40th street. I didn't go back to where I was working. I had just got through with that job when I got orders to go to Proviso and I then went to 40th street and turned the wrecker in. The front end, the truck that was leading was the one that was off the track, the east end. The truck was nearly cross wise. It was enough so, for instance, here is the railway track, and the truck would have been on the tracks there (indicating). The truck was thrown at one side, one side was on one side of the track and the other was on this side, so that it could not be pulled on. Raising up the car and taking the weight off the trucks would permit it to be turned around without any great difficulty. That could have been done by means of jacks, if there had been any there on the train, but it would have taken a good deal longer to do it by jacking up than for the wrecker to come from 40th street. They have to have good men at that, it is dangerous work. I could not tell from the condition of the car where the draw bar had been pulled out, or how it happened that the draw bar came to be pulled out. Some times there are cases where even a regular foreman cannot tell exactly the reason. I have cases every day where draw bars pull out of cars which would puzzle any person to know the reason why. The draft timber to which the draw bar is

attached pulled out. When I got there the timber and the draw bar was under the end of the car. Part of the draw bar was lying back some car lengths, and some of it right there with the rest. The lug of the draw bar was broken off. There are eight main bolts that hold the draft timbers to the sills, and there are quite a few smaller bolts that support it. I could hardly tell from examining the draft timbers whether any of these bolts were loose before or how they had been pulled away from the main body of the car. I didn't look for any rust on the bolts. If the nuts were off and rusted I could tell whether any of the bolts were loose before the accident, or if there had

21 been an old break that happened to be three or four days before I may be able to tell that. I didn't make any observation of that kind. I made a report of this accident afterwards. I make a report of all accidents or wrecks that I attend. I have not that report with me. I took that from this book here. The report that I would make is simply a copy of this, and I turned it in to the Superintendent. This report contains "Draw bar and dft." That means draft timbers falling down. I know I was not there at the time, but I knew they fell down without anybody telling me. I knew that the wreck was caused by the draw bar striking against the ties and doubling up. As near as I can remember the car that was derailed was C. & N. W. 20463, and the car from which the draw bar was pulled was 21039.

*Testimony of W. C. Donickey.*

W. C. DONICHEY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is W. C. Donickey. I live at 30-20th Avenue Maywood. I am employed by the Chicago and North Western Railroad Company as a freight conductor. I have been in the employ of the Company 21 years and 16 years I was a conductor. I was working as a conductor for the same company in the same capacity in 1913. On the morning of October 6th, 1913, I took a stock train from California Avenue to Union Stock Yards. It was Extra 1733, brought to California Avenue by Conductor Roche. I was conductor on this train from California Avenue. There was no difference in the make-up of the train from the California Yards to the Union Stock Yards. I took the cars that Mr. Roche had and carried them over. After leaving California Avenue we had a delay that morning at Brighton Park, of 28 minutes, caused by air hose bursting on one of those stock cars. This burst on Minneapolis & St. Louis 34263. It was the 29th car in the train, which would make it the 22nd car from the way car. It shut the air on the train automatically, and of course the train going into emergency the rear end pulled out the draw bar near the head end of this train. It pulled out a draw bar on the fourth or fifth car, I don't remember now just which one it was. That was not the car upon which they worked. We were delayed there 28 minutes, as

shown by the record. I mean Government Exhibit 1 that I have  
in my hand. I made that record. It is in my handwriting  
22 and I made it at the time it occurred. It is an absolutely correct record of the delay. Brighton Park is five miles from California Avenue.

Cross-examination by Mr. Dickinson:

I made no inspection of the cars in this train when I took the train at California Avenue. It is not customary at that time and place. I think it is about five miles from Brighton Park to California Avenue; we generally call it six or six and a half. Brighton Park is about a mile and a half this side of Union Stock Yards right at the junction of 35th Street and Rockwell. California Avenue at the point I mention is where it intersects Kinzie Street, West Kinzie on the West Side of the city. I was on the rear end of the train when the air hose burst. The draw bar that pulled out was right close to the head end, fourth or fifth car from the head end I was on the other end. The draw bar was pulled from the head end right behind the engine. The breaking of the air hose would set the brakes at the same time. It sets it automatically and that would tend to stop the train. And of course it sets it first on the rear end and the engine pulling has a much greater stress at that particular time and something has to give way, and the draw bar came out. There may have been a defect in the draw bar. I wouldn't say there wasn't. It is usual that there is not more than one car that had a draw bar pull out under this great stress. When one comes out that stops the train suddenly. Some times more than one will come out. In my experience one does usually pull out under the great stress I have named. It is quite frequently the case. When one draw bar comes out the air is set in emergency at the rear end of train. When the automatic air is set, of course, it cannot be set at just the same instant. It takes a little time for the air to travel. Time elapses between the setting of the brake at the rear and front; enough to cause this difference so that the engine would pull out this draw bar. That sort of thing cannot be prevented. There is no precautionary measures in the case of a bursting air hose. Nobody knows that it is going to burst.

23

*Testimony of C. E. Smith.*

C. E. SMITH, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is C. E. Smith. On the morning of the 6th of October I was a brakeman on the train of Mr. Donichay from California Avenue to the Union Stock Yards. I was the rear brakeman. I recall the delay at Brighton Park that morning. We were delayed there by the air hose bursting and throwing the air into emergency and that stopped the train and we found out what it was, and I found that

we also got a draw bar at the same time. The car that had the draw bar pulled out was ahead of the car on which the hose burst. We were delayed there about half an hour by reason of the air hose bursting and the draw bar pulling out.

Cross-examination by Mr. Dickinson:

Just as quick as I began to look the train over to see what was the cause of the emergency stop I discovered that there was a burst air hose at that point probably five or ten minutes after it happened. After the train stopped I met the head brakeman coming towards me and he told me before I got to the head end that there was a draw bar pulled out. I also know of my own knowledge that there was a draw bar pulled out because I went back there and set the car out in order to see that we could pick it up. After the draw bar pulled out I went and examined it myself. Right there at the place where the draw bar pulled out there were several tracks and to repair the connection we put the car up probably five hundred feet west from where we were standing and set the car there and we put on new air where this burst and we came back with part of the train and picked up this car and took it to the stock yards behind the way car. We did this just as soon as we could make the move, probably fifteen or twenty minutes. I should say fifteen minutes elapsed. I did not look at my watch at the time. I don't know just how long it took to make that repair.

24

*Testimony of F. Fallon.*

F. FALLON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is F. Fallon. I live at 2430 Park Avenue. I am a freight brakeman and was on the train of Conductor Donichay on October 6th that took Conductor Roche's train to the stock yards. I recall an accident at Brighton Park that morning. We had about fifty cars on the train going to the yards and we had pulled off the switches and I heard it breaking in two, and I whistled and I went back to see where they were broken in two and I found a car down there with a broken draw bar and I shut the air cock and I told the hind brakeman that we had broken in two, and he told me then that he had a burst air hose. Mr. Smith told me that. The broken air hose was to the rear or behind the broken draw bar. We were delayed at that time about a half hour or forty minutes, I guess. We had to chain that car up or set it out, so we set it out and ran around it, and picked it up on the hind end. Then we went on to the yards.

Cross-examination by Mr. Dickinson:

I was the front brakeman on that train. There are quite a few tracks at this point. There must be 20 there, I guess. It took thirty to forty minutes to take this car out.

*Testimony of Thomas Donahoe.*

THOMAS DONAHOE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is Thomas Donahoe. I live at Clinton, Iowa. I am chief train inspector there. My duties are to look after the in-coming trains from the west and the out going east again. I was on duty on the 5th of October, 1913. I know Mr. J. J. O'Brien. He is one of my inspectors. I keep a record of those inspections of cars. Everything is inspected on the train, even the oil box to see the condition of the journal boxes, and to see if there is enough in them, and the draw bars are looked after and the air hose. Everything  
25 is made a thorough inspection of when the trains come in. When the trains are made up again ready to move out, they are looked over again to see if they are all right and see if the air is leaking any place. This man O'Brien and the other man does that. They were on duty that evening.

Cross-examination by Mr. Dickinson:

The inspection consists of taking off the oil box covers and looking at them and also to look over the draw bars to see if they are all safe to go, and if they are not they put a bad order tag on them. In looking over the draw bars they look to see if there are any bolts broken and they look under the cars. They get down under each car and get their head in under the bar and look at the timbers and bolts. They do that at night just the same as day time. I do not remember this particular car. It was inspected by somebody but not by me. The man O'Brien did. The inspection of a train of 49 cars would take a half an hour. It would take more of we have some brasses to put in. An inspector can get down under each one of these cars and examine the bolts and draw bars and look at the boxes and wheels in half an hour. There are seven bolts in some of the draw bars, and you can examine the train with these lanterns just as good almost as you can in day time. It throws the light right in under the cars.

Redirect examination by Mr. Wheeler:

They use the Davis lantern. It has a big reflector at the back and it throws the light right under the car. They were only two inspectors on that train, one at each side. In inspecting a train in half an hour, a train of 49 cars, to get a good inspection would take half an hour with two men. In making the inspection if they came across any car with a bad draft arm or other defect, the inspectors make an entry of it. He puts a bad order tag on it and if it is not fit to go in the train reports it to the yard office. He will take a record of the number of the car in his book. If the car is all right he does not put anything in his book.

## Recross-examination by Mr. Dickinson:

I know that there were two men inspecting this train because I have the records of it. It is right in there. This is my handwriting and I made it the next morning, off Mr. O'Brien's sheet. He gave me a copy of it. It is made from a sheet that Mr. O'Brien gave me. I know of my own independent knowledge that two men inspected this car, because I was out around the yards with them. I was out in the yards. I don't know the number of the engine. I do not know of my own knowledge without referring to any book the number of the car in this particular case that had a draw bar pulled out. I don't remember now whether I assisted in the inspection myself or not. The man who was an inspector besides O'Brien is Mr. McCune. He is not here.

*Testimony of J. C. O'Brien.*

J. C. O'BRIEN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

## Direct examination by Mr. Wheeler:

I am a car inspector, Chicago and North Western Railway Company, and live in Clinton, Iowa. Have been a train inspector six years. My duties are to inspect the trains on their arrival. All freight trains during the day. Before they leave, we go over them to see if there is any leak in the air or anything else wrong with them. I was on duty October 6th and October 5, 1913. I have a recollection of an inspection of Train Number 114 that arrived there that day. (Witness produces book.)

Here is the record of Train Number 114. I keep a record myself and show the numbers of the trains I inspect. I inspected train 114 that came in on that afternoon. It was Mr. Burroughs brought the train to Clinton off the Iowa Division. I know that I inspected Train 114 when it left Clinton. Mr. Warner was the conductor who took Train 114 out of Clinton. I have a record of my inspection of this train. It is in that book there I believe. It is not in my handwriting but in Mr. Donahoe's, the foreman. I don't think Mr. Donahoe keeps the slips that I give him. I write on a slip the record of the inspection, and I turn them in to him the next morning and he p-ts them in his book. If there is anything the matter with the car I make a record of it. If there is nothing the matter with the car I do not make a record of it. In inspecting the cars we inspect all parts of the cars. I inspected all cars that left Clinton on that evening. I was on duty all the time. According to the records in the book I inspected the train in and out. I did inspect the trains in and out of Clinton on that afternoon.

## Cross-examination by Mr. Dickinson:

I was not the only claim inspector there at that time. There was another. I inspect one side of all trains that come in. Another

man inspected other portions of the train. The other man's name was McCune. I had particular defects I was supposed to look out for. We looked them all over to see if there was anything wrong with them. If we saw there was anything wrong with it we set it out as bad order. I remained on duty from seven o'clock until six; from seven A. M. until six P. M.

*Testimony of Thomas Donahoe.*

THOMAS DONAHOE, recalled by the defendant, testified as follows:

Direct examination by Mr. Wheeler:

The book which you show me is in my handwriting. I got the information that I put in it from O'Brien. Got it some time in the morning of the same day, not the same day, but the next morning, as soon as his report was turned in to me. The entries in the book are correct according to the information I received from O'Brien.

Q. In that book is there any entry of the inspection of the Chicago and North Western Railway car 21239, October 5, 1913?

Mr. Dickinson: I object to that question.

The Court: I will sustain the objection to the offer.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

(Witness continues:) I enter in this book reports made to me by the car inspectors. That is the only man that gives me this report, the only man who does this work for me, O'Brien keeps a record for me, turns in a report to me each day. I make the entry in the book every morning. If I don't get it then in the evening. He gives me the report the next morning and I put it down the same morning. Just as soon as I get the reports from O'Brien, I make the entry in that book of the exact statement and information that O'Brien gives me and it is correct. I throw away the slip that O'Brien  
28 hands me after I have it entered in the book. I dispose of the slip, throw it away, and this book that I have in my hand is the only record of the inspection that is kept. Mr. O'Brien doesn't keep any record except the one that he gives me. This book is a record of the man who has inspected those cars that came into Clinton on the 5th day of October, 1913. The bad order cars are not entered in this book. We have them in a different book. This is the incoming trains and out going trains that the men have inspected on the south side and the north side. It shows the record of inspection of the trains.

We have no record of inspection of the cars themselves on 114, only the record here of brasses being put in the way car. We have the record of the inspection of Train 114 made by O'Brien, and entered in the record is that brasses were put in the way car on that train. That is the only think we have on that train 114, putting brasses in the way car.

*Testimony of William Burroughs.*

WILLIAM BURROUGHS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

I am a conductor for the C. & N. W. Railway Company and live at Clinton, Iowa. I have been employed by the Company 26 years, 15 years as a conductor. I brought a train into Clinton, Iowa, on the 5th day of October, 1913, Train Number 114. I have with me the record showing the cars contained in that train. The record was made by myself. We correspond the way bills with the numbers of the cars and then put the numbers down in my book. The numbers were taken from the way bills and the way bills corresponded with the cars and then I take it off the way bills. I check the way bills with the cars, and from the way bills put the numbers of the cars in my book. I arrived at Clinton, Iowa, as my record shows at 3:10 in the afternoon. I had C. & N. W. car Number 21239 in my train and it was in my train when I reached Clinton, Iowa.

Cross-examination by Mr. Dickinson:

I got the way bills in Belle Plaine. That is a division point 115 miles west of Clinton. The conductor who brought the train from Boone to Belle Plaine gave them to me at that point. I had a way bill for car 21239. It was a C. & N. W. stock car. This way bill would show nothing with reference to inspection. From the way bill I entered it up in my train book in my own hand writing. I had it when I left Belle Plaine and I suppose it would be done, would have to be done as a general rule and I had it done when I got to Beverly, that is thirty miles. I arrived at Clinton but did not leave there. That was the end of my run. I do not know how far Belle Plaine is from Ringsted, Iowa. I never ran to Ringsted and I do not know how far it is from Clinton or Belle Plaine to there. I suppose the agent where the stock was shipped from made the way bills. I didn't see him do it.

Redirect examination by Mr. Wheeler:

I checked the way bills here with the car numbers and the cars afterwards. I absolutely know that the numbers on the way bills were the same as the numbers of the cars. I checked these up from the cars that were in my train.

*Testimony of Lloyd Warner.*

LLOYD T. WARNER, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

My name is Lloyd T. Warner. I am a conductor in the service of the Chicago and North Western Railway Company, and was on

the 5th of October, 1913. I have been a conductor nine years and have been thirteen years in the service of the Company. I ran a train out of Clinton, Iowa, on the afternoon of the 5th of October, 1913. I made a record which shows when I left there. I have a train book which shows the numbers of the cars I had in the train and the numbers of each particular car. I made the record right after leaving Clinton by taking a check of the train. I checked up the cars on the switch list. Then I went to the office and checked up with the bill clerk. Then I checked them up with the car numbers on the cars themselves. I had in that train on that afternoon C. & N. W. car 21239. I hauled it from Clinton to Nelson, Illinois. I set out that car and four others at Nelson, Illinois.

30 Cross-examination by Mr. Dickinson:

I made this record up leaving Clinton. I checked the switch list and marked up each car, after I got on to the train. When the train comes into the yard I know it is my train. I take the switch list and made a notation of the number and initials of the cars. Then I taken them to the yard clerk. Of course, I have got the numbers right off the cars. I take that switch list and check it up with the cars. I start at the hind end and check it up with each car and then I go to the office and read off the numbers and the clerk will give me my bills, so that it is by actual check of the train that I get this list, and I know of my own knowledge that this train contained C. & N. W. 21239. I have a record in my car book that the car was set out, and it just shows that I set it out at Nelson. It does not show for what purpose I set it out, because the train was too long and was kind of heavy and was not making the required time. There were 62 cars in that train. I had to select this car from the others because it was in between two interlocking tracks and I had to pull so many over not to block the tracks, and I think I had to pull over nine to clear the plant at both ends and keep traffic moving. Where I had to shift them out of the way to clear, I set them out. I had to hang on to nine and I had to reduce five. I inspected the whole train at that point, but not when I set it out.

Redirect examination by Mr. Wheeler:

I made an inspection of the cars in my train while I was going from Clinton to Nelson. Walked clear around from the hind end to the rear end on both sides and inspected for any defects of the running gear of the car through and through. I looked the coupling apparatus all over and I did not discover anything wrong with any of the cars in this train. The first place I inspected was Round Grove. I was alone on that inspection and my brakeman does at certain places assist me but not there.

Recross-examination by Mr. Dickinson:

I left Clinton at 5:20 p. m. My record doesn't show when we got to Nelson, but we arrived there at 7:30. There was one inspec-

tion between Clinton and Nelson. It took about twelve minutes to inspect the train. That was at Round Grove at 6:35.

31 There were 62 cars in the train. I made the inspection one way and then the train pulled by me the other way. I walked up and then I waited that night and let the train pull by me. I inspected one side of the train while standing and the other side while moving slow. I had my lantern with me and I was sitting down where I could see underneath the running gear of the train. The train was just moving so I could get on the other end. It was going by from the time we stopped until we started again and I inspected the train up to the head end from the rear end. With similar inspections I have discovered considerable cars with pulled draw bars in the past. Weak draw bars. That is, any of the bolts loose in the timbers and things like that. If it was pulling out far you could tell that when it was going by you. I can tell the difference when it goes by me because I have seen so many of them. If the train was standing there, if I gave it a thorough inspection I can tell that. That is what I did going up. I could have discovered it. If the bolts were loose I could tell that going up, and then when the train started the draw bar would pull out just a little farther than the ordinary distance. You could do that when the train was standing still, but then the chances are that the slack would be all up together.

I was confined to the inspection of one side to tell whether there were any draw bars that were loose. It took only the 12 minutes to go up, then the train pulled by me slow so I could get on the rear end. That would be very slow so I could do that. It took less than 12 minutes for my train to pull up to me. I don't know, probably about five or six. If there had been any defective draw bar I could have located it.

#### *Testimony of A. C. Johnston.*

A. C. JOHNSTON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

I am an engineer in the service of the Chicago and North Western Railway Company, and was employed on October 5th, 1913. I pulled a train on that afternoon out of Clinton towards Chicago. It was an extra train, coming into Clinton it had a number. I don't know what number. It was Mr. Warner's train. The same train that the last witness mentioned. I have been an engineer  
32 five years. I haven't any record of setting cars out at Nelson, but I remember it. I think we set out five. I have a record of the trips I made which I make myself. We left Clinton that day at 5:20 in the afternoon. I had a very heavy train, 62 cars, and it was necessary to take lots of time in starting and stopping to avoid pulling out draw bars, so we would take the full amount of slack and start ahead very easy, opening the cylinder cocks so as to not have the train go ahead too suddenly and by opening them and have

the engine proceed slowly and gradually we would finally get the train moving when we would increase our speed. That is the way I operated all the way from Clinton into Nelson. Every time we started the train we started it in this manner, and when we went to stop we made a slow gradual stop. There was no jerking on the train at any time.

Cross-examination by Mr. Dickinson:

I know we left Clinton at 5:20 p. m. because I looked at my watch. I recall that. I always look at my watch for the leaving time. I have got it in this record also. I don't remember what time we got to Nelson. I don't keep a record of such time as that. The conductor does that. I do not keep a record of when we leave intermediate points. I have no record of when I left Nelson. I have no record of the number of cars that were taken out at Nelson. I know the amount of cars. The conductor always tells me how many cars we are handling, and that is all I know about it. He told me we set out five.

*Testimony of M. H. McCune.*

M. H. McCUNE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Wheeler:

I live at Clinton, Iowa. My occupation is handling thread for the Collis Company. I have been employed about a month and a half. On October 5, 1913, I was working for the Chicago and North Western Railway Company at Clinton, Iowa, as a car inspector. John O'Brien, who is here in the court room, was working with me. We were working on the afternoon of October 5th inspecting cars. I was working with O'Brien on these trains in the afternoon, inspecting them and doing what repairs that were to be done to the  
33 cars. We were the only inspectors on that afternoon. I made a complete record of my inspection. We made what repairs we could make and if the car was not safe to go forward, Mr. O'Brien would take the number of the car and I would put on the bad order tag. I called the number to him if it was a bad order car, and announced that this was a bad order car. He took the number from the car itself and I put the bad order tag on. Whatever record I have is what is in the record book. We went down along the train and looked at all the covers to detect hot boxes and looked at the draft timbers and draft riggings. I inspected the draft riggings and all draft gears, draw bars, wheels and timbers and journal boxes. If any car was able to go and there were no defects, what little defects there were was repaired and the car went forward. I did not see what Mr. O'Brien wrote down in his record.

Cross-examination by Mr. Dickinson:

All the records of car numbers we took are in the record books, that is, what trains. I made the record myself. I could not tell

you from my independent recollection or from referring to that record whether I inspected car 21239, C. & N. W. I am only able to state according to the records themselves. I did not keep any numbers. We did not keep the numbers of every car in each train. There is nothing in my record now which I now have which will show positively that car 21239 C. & N. W. was inspected on the 5th of October, 1913, by me or anybody else. I do not know of anybody else that would know about it other than myself.

Redirect examination by Mr. Wheeler:

*Testimony of John O'Brien.*

JOHN O'BRIEN, called at a witness on behalf of the defendant, having been first previously sworn, testified as follows:

Direct examination by Mr. Wheeler:

The three books which you now show me are what is known as Train Book, Bad Order Book and Brass Book, kept by the Chief Inspector. I make the memoranda for the entries that go into these books on any train that I inspect. As to any train that I 34 inspected on the 5th of October, 1913, or that Mr. McCune and I inspected, I made an entry on this memorandum myself. McCune and I worked along on the train. I kept the record. He did not keep any record that I know of. If he told me that a car was bad order, I took the number of it and he put the tag on it. We was working on the switchmen's side, on the side that the switchmen would work on, and that was the side he tagged. McCune inspected one side of the train. I did not do all the repairs. If there was anything on his side of the train he repaired it, and some times it was necessary for both of us to get on that side or the other side. I entered in the memorandum all the information that Mr. McCune communicated to me about cars, and I did it correctly, and I entered in it correctly the information that I myself obtained from my inspection of the cars, and that information was turned over to Mr. Donahue, the Chief Inspector, and that relates to the entries which we subsequently made in these three books to which you have called my attention.

Cross-examination by Mr. Dickinson:

I have no record of car C. & N. W. 21239 on that day. If that car was in the train I did inspect it, but I don't take any numbers, no check of the train. I do not know at all whether on that day I made an inspection of that car out there at Clinton. I don't remember only by the record. On that subject I have got to go by the record.

*Testimony of Thomas Donahue.*

THOMAS DONAHUE, recalled as a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct examination by Mr. Wheeler:

I made the entries in all the three books which you now show me, the train book, the bad order book and the brass book. I got the information, so far as Mr. O'Brien's reports are concerned from Mr. O'Brien. I made the entries the next morning after Mr. O'Brien's report. I put everything in the books that he gave me.

Thereupon the said three books were offered and received in evidence, and are attached hereto and made a part hereof.

And thereupon the defendant rested its case.

35 And thereupon the Government to further maintain the issues on its behalf introduced and offered the following evidence in rebuttal:

*Testimony of F. J. Roche.*

F. J. ROCHE, recalled as a witness, in behalf of the Government in rebuttal, having been previously sworn, testified as follows:

Direct examination by Mr. Dickinson:

This is what is known as a wide-awake report made by me, in my handwriting, as far as I handled the train. I handled the train from Clinton to California Avenue, Chicago. After the words in the report, "N J Tower, 7:58 8:20" is the notation "Blocked by train ahead." That is, delayed for the train or trains ahead. That means that we were delayed the length of time 22 minutes for that purpose. The next notation is, "Nelson, 8:25 and 8:52." I got an order to back up and let Number 11 go. Number 11 is a west bound passenger.

The next one is at Ashton, "Ashton 10:05 and 10:15, water."

The next one, "Stops for Hall Signals 1:24 and 1:22, Number 70 train ahead."

The next one, "Malta, 11:22 and 11:32 water."

The next one, "De Kalb, 11:55—12:15, blocked by trains ahead; set out car of stock."

The next one "West Chicago, 1:27 to 1:42, coal and water." "Wheaton, 2:07 to 2:15, set o-t stock."

And the next is Proviso where the *is* derailment occurred.

I do not recall what position the train in question where car Number 21239 was placed with reference to the other cars only from the record of the car book. I know the car was at the head end of the train. I can tell from the car book which is a record of the cars in the position they had been in the train where car C. & N. W. 4999 was. Leaving Clinton this car was 46 cars from the engine and the other one, 21239 was somewhere in the head end inside of the first few cars, I think it was unless I hung on to cars in backing it up and it would not show in my car book whether I did or not. At the point where we stopped at Proviso there are four yards. It is a big yard with a number of switch tracks and switch facilities. There are four tracks.

I do not know how far it is from Ringsted, Iowa, to Clinton, Iowa. I do not run to Clinton.

*Testimony of H. M. Eicholtz.*

H. M. EICHOLTZ, called as a witness on behalf of the Government in rebuttal, having been previously sworn, testified as follows:

Direct examination by Mr. Dickinson:

My name is H. M. Eicholtz. I am Division Superintendent of the North Western Railroad, and have been for three years. This distance from Ringsted, Iowa, to Clinton, Iowa, on the North Western Railroad is approximately three hundred miles, and it is 138 miles from Clinton to Chicago.

And thereupon the Government rested its case.

Which was all the evidence offered or introduced at the trial of said cause.

And Thereupon at the close of all the testimony in the case, the defendant, by its counsel, filed its motion in writing and asked the Court to direct the jury to find the defendant not guilty, which motion is in words and figures following, to wit:

*Motion.*

(Title of Cause.)

And now comes the defendant, Chicago and North Western Railway Company, by William G. Wheeler, its attorney, at the close of all the evidence offered on behalf of both the plaintiff and defendant in the above entitled cause, and moves the Court to give to the jury the following instruction:

"The court instructs the jury to find the defendant not guilty."

And the said defendant herewith tenders to the court a written instruction to that effect, separate and apart from any other instruction tendered in said cause, and asks the Court to read the same to the jury.

WILLIAM G. WHEELER,  
*Attorney for Defendant.*

And the defendant tendered to the Court the following instruction:

"The Court instructs the jury to find the defendant not guilty."

And thereupon the court denied and overruled said motion and refused to give such instruction to the jury, to which action of the

37 Court in so denying and overruling said motion and in so refusing to give said instruction, to the jury, the defendant by its counsel then and there duly excepted.

*Instructions to Jury.*

And thereupon the Court gave to the Jury among others the following instructions:

The language of this statute providing for the limitation, and including the clause which provides the excuse for confinement in

the case of confinement beyond the time fixed by the limitation says, in substance, that the carrier shall be excused when it is prevented from complying with the statute by storm or accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. So, it presents to you the question for determination on this fact: Whether or not this car of stock by the exercise of due diligence by this Railway Company, the carrier, could have been transported from its point of origin out in Iowa, to destination, Union Stock Yards, within thirty-six hours. This inquiry is not merely whether or not, at Proviso, the thing was done which good railroading would require to be done to get this car, which the evidence shows was wrecked, back on the track and in condition to permit the movement; this inquiry is not merely whether or not, where this air hose broke, at Brighton Park, the Railroad Company did what a railroad company ought to do,—what good railroading requires to be done to reduce delay and provide movement at Brighton Park. Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company, by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company.

Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and

38 to be considered by you in determining whether or not due diligence has been shown by the carrier.

Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work or the division superintendent's work, but the whole thing involved in the transaction of operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human in-

genuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safe guards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six limit they are excused; that is not the law.

But that is not the limit of your inquiry. You may consider the evidence in this case as to the movement of this stock from origin to destination, considering the entire time taken up at various places where the evidence shows there were stops, and you are authorized to find under the evidence whether if you please, it measures up to the standard of due diligence exercised by this defendant in accomplishing the thing with a view to obeying this law. You are authorized to find that the delay is excused by these two accidents. If you

39 find on the evidence in this case that the accidents happened, and that the lost time they occasioned is as testified by the defendant's witnesses, that, as everything else in this matter is the way of evidence is for your ultimate determination.

The Court: Any exceptions?

Mr. Wheeler: Yes, your Honor. It is this, that this suit involves the train movement from point of origin to destination.

The Court: You except to that part of the charge?

Mr. Wheeler: I do, and to that part of the charge where your Honor says that the railroad cannot run its trains as it pleases with the idea that at the last moment of slipping in within the thirty-six hours and then because of some accident we cannot get it.

The Court: All right.

Mr. Wheeler: To those two parts.

The Court: Yes.

And thereupon the defendant, by its counsel, duly excepted to the giving by the Court to the jury of the foregoing instructions and each and every part thereof.

And thereupon the jury returned its verdict finding the defendant guilty, which is of record herein.

### *Motion.*

And thereupon at the same term in which said action was tried, the defendant duly filed its written motion for a new trial, which motion is in the words and figures following, to-wit:

(Title of Cause.)

And Now Comes the defendant, by its counsel, and moves the Court to set aside the verdict heretofore rendered herein, and to grant a

new trial in this cause, and for grounds for said motion presents and shows to the Court the following, towit:

1. The Court admitted on the trial improper evidence on the part of the plaintiff.

2. The Court refused to admit proper evidence offered by the defendant.

3. The Court improperly refused and denied the defendant's motion for peremptory instruction at the close of the plaintiff's evidence, and refused to give to the jury the peremptory instruction asked by the defendant.

4. The Court improperly denied the defendant's motion for peremptory instruction at the close of all the evidence and refused to give to the jury the peremptory instruction offered by the defendant.

5. The Court gave improper instructions to the jury.

40 6. The verdict was contrary to the law.

7. The verdict was contrary to the evidence.

CHICAGO AND NORTH WESTERN  
RAILWAY COMPANY.

By WILLIAM G. WHEELER,

*Its Attorney.*

*Bill of Exceptions.*

And Thereupon the hearing of said motion was continued until the 27th day of February, 1915.

And on said date the Court after hearing the argument of counsel on both sides overruled and denied said motion of the defendant for a new trial, to which ruling of the Court is so overruled and denying said motion, the defendant by its counsel then and there duly excepted.

And Thereupon the cause was further continued by the Court until the 30th day of June, 1915, and upon said date the Court assessed a fine of One Hundred Dollars against the defendant, and entered judgment upon the verdict in said sum of One Hundred Dollars and costs.

To which ruling of the Court in so fining the defendant the sum of One Hundred Dollars and in so entering judgment, the defendant, by its counsel, then and there duly excepted.

Thereupon, upon the motion of defendant, the time to prepare and file its bill of exceptions herein was extended for thirty days from said date, and the amount of bond upon writ of error was fixed at the sum of Five Hundred Dollars.

And Forasmuch as the matters and things above set forth do not fully appear of record, the said defendant presents its bill of exceptions in this case, which contains all of the evidence in the said cause and all of the rulings of the said Court upon the trial of said cause, and all the proceedings had during the trial of said cause, and prays that the same may be allowed, signed and sealed, and made of record in said cause by the Honorable Court, pursuant to the law in such cases made and provided, plaintiff's attorney having duly consented thereto.

Which is accordingly done and ordered this 24th day of July, A. D. 1915, being one of the days of the November, 1914 Term of said Court, as heretofore extended and continued.

KENESAW M. LANDIS,  
*District Judge.*

O. K.

FREDERICK DICKINSON,  
*Ass't U. S. Att'y.*

(Endorsed:) Filed July 24, 1915, T. C. MacMillan, Clerk.

41 And on to-wit: the twenty-fourth day of July, 1915, came the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Prayer for Reversal in words and figures following to-wit:

*Prayer for Reversal.*

Filed July 24, 1915.

Prayer for Reversal.

In the District Court of the United States for the Northern District of Illinois, Eastern Division Thereof.

Gen. No. 31454.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Plaintiff in  
Error,  
vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Now Comes the above named plaintiff in error and because of the errors committed by said Court, as set forth in the assignment of errors herein prays a reversal of the judgment in said cause heretofore rendered therein on the thirtieth day of June, A. D. 1915, in favor of said defendant in error and against the said plaintiff in error.

WILLIAM G. WHEELER,  
*Attorney for Plaintiff in Error.*

(Endorsed:) Filed July 24, 1915, T. C. MacMillan, Clerk.

And on the same day to-wit: the twenty-fourth day of July, 1915, came the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Petition for Writ of Error in words and figures following to-wit:

*Petition.*

Filed July 24, 1915.

## Petition for Writ of Error.

In the District Court of the United States for the Northern District of Illinois, Eastern Division Thereof.

Gen. No. 31454.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

To the United States Circuit Court of Appeals for the Seventh Circuit and the Judges Thereof and to the District Court of the United States for the Northern District of Illinois, Eastern Division, and to the Judges Thereof:

The petition of the above named plaintiff in error, by William G. Wheeler, its attorney, respectfully represents:

That at a regular term of the United States District Court for the Northern District of Illinois in the Eastern Division thereof, begun and held in the City of Chicago, in said District, on the first Monday in November, A. D. 1914, said term being thereafter adjourned to the sixth day of November 1915, the above named plaintiff in error was found and adjudged by a jury, duly empaneled, sworn and charged, to be guilty of the charges set forth in the declaration herein, wherein plaintiff in error was charged with having violated the act of Congress known as "An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one state or territory or the District of Columbia, into or through another state or territory or the District of Columbia, and repealing sections 4386, 4387, 4388, 4389, and 4390 of the United States Revised Statutes" approved June 29th, 1906, and that in the rendition of said verdict and the record and proceedings of said cause, manifest error was intervened to the great damage of your petitioner, as more fully appears by its written assignment of errors, which is presented and filed herewith:

Wherefore your petitioner prays that a writ of error may issue out of and under the seal of the said Circuit Court of Appeals or out of the said District Court directed to the District Court for the Northern District of Illinois, Eastern Division thereof and to the Judge thereof, to the end that the said judgment of the said District Court may be reviewed by the said United States Circuit Court of Appeals and that the said errors may be corrected by the said Circuit Court of Appeals and that the record in said cause

be ordered to be certified to said Circuit Court of Appeals, as by law provided; and

Your petitioner prays that the said judgment of said District Court may be reversed.

WILLIAM G. WHEELER,  
*Attorney for Plaintiff in Error.*

(Endorsed:) Filed July 24, 1915, T. C. MacMillan, Clerk.

And on the same day to-wit: the twenty fourth day of July, 1915, came the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Assignment of Errors in words and figures following to-wit:

*Assignment of Errors.*

Assignments of Error.

In the United States Court for the Northern District of Illinois,  
Eastern Division.

No. 31454.

UNITED STATES OF AMERICA  
vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Assignments of Error.

Now comes the Chicago and North Western Railway Company, plaintiff in error above named, by William G. Wheeler, its attorney, and makes and files here its assignment of error as follows, towit:

1

The court erred in denying and overruling the defendant's motion for peremptory instruction at the close of the plaintiff's case, and in refusing to instruct the jury as follows:

"The court instructs the jury to find the defendant not guilty."

44

2.

The court erred in overruling and denying defendant's motion at the close of all the evidence for a peremptory instruction in its favor and in refusing to instruct the jury as follows:

"The court instructs the jury to find the defendant not guilty."

3.

The court erred in directing the jury to find the defendant guilty.

4.

The court erred in denying and overruling the defendant's motion for a new trial.

5.

The court erred in assessing a fine of \$100.00 against the defendant and entering a judgment upon the verdict for said sum with costs.

6.

The court erred in sustaining the objection of the plaintiff to the following question:

"You may state how you operated that train that night as compared with the way in which it was usually operated?"

7.

The court erred in giving to the jury the following instruction:

"The language of this statute providing for the limitation, and including the clause which provides the excuse for confinement in the case of confinement beyond the time fixed by the limitation says, in substance, that the carrier shall be excused when it is prevented from complying with the statute by storm or accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. So, it presents to you the question for determination on this fact: Whether or not this car of stock by the exercise of due diligence by this Railway Company, the carrier, could have been transported from its point of origin out in Iowa, to destination, Union Stock Yards, within thirty-six hours. This inquiry is not merely whether or not, at Proviso, the thing was

45      done which good railroading would require to be done to get this car, which the evidence shows was wrecked, back on the track and in condition to permit the movement; this inquiry is not merely whether or not, where this air hose broke, at Brighton Park, the Railroad Company did what a railroad company ought to do,— what good railroading requires to be done to reduce delay and provide movement at Brighton Park. Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company, by the exercise of diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company."

8.

The court erred in giving to the jury the following instruction:

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be

considered by you in determining whether or not due diligence has been shown by the carrier."

## 9.

The court erred in giving to the jury the following instruction:

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the

46 brakeman's work, or the division superintendent's work, but the whole thing involved in the transaction or operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say, whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safeguards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course, it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six hour limit they are excused; that is not the law."

## 10.

The court erred in giving to the jury the following instruction:

"But that is not the limit of your inquiry. You may consider the evidence in this case as to the movement of this stock from origin to destination, considering the entire time taken up at various places where the evidence shows there were stops, and you are authorized to find under the evidence whether if you please, it measures up to the standard of due diligence exercised by this defendant in accomplishing the thing with a view to obeying the law. You are authorized to find that the delay is excused by these two accidents. If you find on the evidence in this case that the accidents happened, and that the lost time they occasioned is as testified by the defendant's witnesses, that, as everything else in this matter in the way of evidence is for your ultimate determination."

WILLIAM G. WHEELER,

*Attorney for Plaintiff in Error.*

(Endorsed:) Filed July 24, 1915, T. C. MacMillan, Clerk.

47

*Order of July 24, 1915.*

And on the same day to-wit: the twenty-fourth day of July, 1915, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, Judge of said Court, appears the following entry to-wit:

Law. 31454.

UNITED STATES OF AMERICA

VS.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Now comes the defendant by its attorney and presents its petition for Writ of Error and assignments of error, bill of exceptions and bond in the sum of Five Hundred (\$500) dollars, and moves the court for the allowance of a Writ of Error to the United States Circuit Court of Appeals, to have reviewed the judgment, heretofore entered herein.

It Is Ordered by the court that said bond and bill of exceptions be and the same are hereby approved and that a Writ of Error be and the same is hereby allowed.

*Bond.*

Filed July 24, 1915.

And on to-wit: the twenty-fourth day of July, 1915, there was filed in the clerk's office of said court in said entitled cause, a certain Bond on Writ of Error, in words and figures following to-wit:

Know All Men by these Presents, That we, Chicago and North Western Railway Company, as principal, and National Surety Company, as sureties, are held and firmly bound unto United States of America, in the full and just sum of Five Hundred Dollars (\$500.00) to be paid to the said United States of America, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 16th day of July in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court, between United States of America, plaintiff, and Chicago and North Western Railway Company, defendant,

48      defendant, a judgment was rendered against the said defendant, and the said defendant, having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at the United States Circuit Court of Appeals

for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Chicago and North Western Railway Company shall prosecute its writ to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO AND NORTHWESTERN RAIL-  
WAY COMPANY,

By EDWARD M. HYZER, [SEAL.]

*Vice President.*

NATIONAL SURETY COMPANY,

By W. HERBERT STEWART, [SEAL.]

*Resident Vice President.*

HELGER W. CARLSON,

[SEAL.]

*Resident Ass't Secretary.*

Sealed and delivered in presence of—

Attest:

JOHN D. CALDWELL,

[SEAL.]

*Secretary.*

Approved by—

K. M. L.,

*Judge of the District Court.*

(Endorsed:) Filed July 24, 1915, T. C. MacMillan, Clerk.

49

*Præcipe.*

Filed July 24, 1915.

*Præcipe* for Record.

In the District Court of the United States for the Northern District  
of Illinois, Eastern Division.

Gen. No. 31454.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant.

*Præcipe.*

To the Clerk of said Court:

Please prepare a transcript in the above entitled cause and include therein copies of the following:

1. The declaration,
2. The defendant's plea,

3. The verdict and judgment,
4. The bill of exceptions and exhibits attached thereto,
5. The prayer for reversal,
6. The petition for writ of error,
7. The assignments of error,
8. The bond for writ of error,
9. The order for writ of error,
10. The citation.

WILLIAM G. WHEELER,  
*Attorney for Defendant.*

(Endorsed:) Filed July 24, 1915, T. C. MacMillan, Clerk.

50

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America, Plaintiff vs. Chicago and North Western Railway Company, Defendant, a manifest error hath happened, to the great damage of the said Chicago and North Western Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 24th day of July in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.]

T. C. MACMILLAN,  
*Clerk of the District Court of the  
United States for the Northern  
Dist. of Illinois,*

By JOHN H. R. JAMAR,  
*Deputy Clerk.*

Allowed by

KENESAW M. LANDIS, *Judge.*

## 51 NORTHERN DISTRICT OF ILLINOIS, ss: .

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 31st day of July, A. D. 1915.

[SEAL.]

T. C. MACMILLAN,  
*Clerk United States District Court,  
 Northern District of Illinois,*  
 By JOHN H. R. JAMAR,  
*Deputy Clerk.*

(Endorsed:) 31454 United States Circuit Court of Appeals Seventh Circuit Chicago & North Western Ry. Co. Plaintiff in Error, vs. United States, Defendant in Error. Writ of Error. Filed July 24, 1915, T. C. MacMillan, Clerk. Copy deposited for the defendant in error in the Clerk's Office, U. S. District Court, Northern District of Illinois.

*Certificate of Clerk.*

NORTHERN DISTRICT OF ILLINOIS,  
*Eastern Division, ss:*

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court, made in accordance with *Præcipe* filed in the cause entitled, United States of America, Plaintiff, vs. Chicago and North Western Railway Company, Defendant, Number 31,454, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this 31st day of July, 1915.

[SEAL.]

T. C. MACMILLAN,  
*Clerk,*  
 By JOHN H. R. JAMAR,  
*Deputy Clerk.*

*Citation.*

## 52 UNITED STATES OF AMERICA, ss:

The President of the United States to United States of America,  
 Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein

Chicago and North Western Railway Company is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kenesaw M. Landis, Judge of the District Court of the United States, this 24th day of July, in the year of our Lord one thousand nine hundred and fifteen.

KENESAW M. LANDIS.

July 26, 1915.  
Service accepted.

CHARLES S. CLYNE,  
*U. S. Att'y.*

(Endorsed:) No. 31454. District Court of the United States, Northern District of Illinois, Eastern Division. Chicago and North Western Railway Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Returnable August 23, 1915. T. C. MacMillan, Clerk. Filed July 26, 1915, T. C. MacMillan, Clerk.

53 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 52, inclusive, contain a true copy of the printed record, printed under my supervision, and filed August 21st, 1915, on which this cause was heard, argued and determined, in the case of Chicago & Northwestern Railway Company vs. United States of America, No. 2294, October Term, 1914, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I herewith subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this seventeenth day of July A. D. 1916.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,  
*Clerk of the United States Circuit Court  
of Appeals for the Seventh Circuit,*  
By FREDERICK G. CAMPBELL,  
*Deputy Clerk.*

54 At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court-room, in the City of Chicago, in said Seventh Circuit, on the sixth day of October, 1914, of the October Term, in the

year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth year.

And afterwards, to-wit: On the twenty-sixth day of August, 1915, in the October term last aforesaid, came the plaintiff in error, by its counsel, Mr. William G. Wheeler, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:—

United States Circuit Court of Appeals for the Seventh Circuit,  
October Term, 1914.

No. 2294.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff in  
Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

The Clerk will enter my appearance as counsel for the Plaintiff in Error.

WILLIAM G. WHEELER.

Endorsed: Filed Aug. 26, 1915. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the sixth day of September, 1915, in the October term last aforesaid, came the defendant in error, by its counsel Mr. Charles F. Clyne, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:—

55 United States Circuit Court of Appeals for the Seventh Circuit,  
October Term, 1914.

No. 2294.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff in  
Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

The Clerk will enter my appearance as counsel for the Defendant in Error.

CHARLES F. CLYNE,  
*U. S. Attorney.*

Endorsed: Filed Sept. 6, 1915. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court-room, in the City of Chicago, in said Seventh Circuit, on the fifth

day of October, 1915, of the October term, in the year of our Lord one thousand nine hundred and fifteen and of our Independence the one hundred and fortieth year.

And afterwards, to-wit: On the fourth day of January, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

56

TUESDAY, January 4, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.  
Hon. Christian C. Kohlsaat, Circuit Judge.  
Hon. Julian W. Mack, Circuit Judge.  
Hon. Samuel Alschuler, Circuit Judge.  
Edward M. Holloway, Clerk.  
John J. Bradley, Marshal.

Before:

Hon. Christian C. Kohlsaat, Circuit Judge.  
Hon. Julian W. Mack, Circuit Judge.  
Hon. Samuel Alschuler, Circuit Judge.

2294.

CHICAGO & NORTHWESTERN RAILWAY COMPANY  
vs.  
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on February 8, 1916.

And afterwards, to-wit: On the eighth day of February, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

TUESDAY, February 8, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

57 Present:

Hon. Christian C. Kohlsaat, Circuit Judge, presiding.  
Hon. Julian W. Mack, Circuit Judge.  
Hon. Samuel Alschuler, Circuit Judge.

Hon. Albert B. Anderson, District Judge.  
Edward M. Holloway, Clerk.  
John J. Bradley, Marshal.

Before:

Hon. Julian W. Mack, Circuit Judge.  
Hon. Samuel Alschuler, Circuit Judge.  
Hon. Albert B. Anderson, District Judge.

2294.

CHICAGO & NORTHWESTERN RAILWAY COMPANY

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern  
District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Charles A. Vilas, counsel for plaintiff in error, and by Mr. Frederick Dickinson, counsel for defendant in error, and the Court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the eighteenth day of April, 1916, in the October term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court in the words and figures following, to-wit:—

58 In the United States Circuit Court of Appeals for the Seventh  
Circuit, January Session, October Term, 1915.

No. 2294.

CHICAGO & NORTHWESTERN RY. Co., Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Appeal from the District Court of the United States for the Northern  
District of Illinois, Eastern Division.

Before Mack and Alschuler, Cir. JJ., and Anderson, Dist. J.

The action was for violation of the "28 hour law." It appears that the stock was loaded October 4th at 6 P. M. at Ringsted, Iowa, a station on defendant's road, and conveyed by defendant over its road to the Stock Yards at Chicago where it was unloaded at 9:05 A. M. of the 6th, having been confined in the car continuously for 39 hours and 5 minutes. The shipper agreed to 36 hours' confinement. The car containing the stock was one of an extra train carrying stock only. Defendant gave evidence that the train reached Clinton, Iowa,

which station it left at 6:30 P. M. of the 5th, for Chicago; that at Nelson, Ill., there were picked up and put into this train 5 cars of stock which had been left there by a prior train, because it was found to be too heavy. The schedule running time from Clinton to Chicago was 9 hours, but it had been done in 6 hours. The train reached Proviso, a station just outside of the city limits of Chicago, and 16 miles from place of unloading, at 2:48 A. M. of the 6th, and while running through this station a drawbar was pulled out of car No. 21239, which was the fifth car from the engine, and one of those picked up at Nelson, and one of the timbers which held the drawbar, falling upon the rails, caused derailment of the car following.

It was necessary to send for a wrecker to re-rail the car. The 59 wrecker was at Palatine, all ready with its crew to start on such emergencies. Notice of this derailment was received by the foreman of the wrecking crew at 4 A. M. He immediately started for Proviso, reaching there at 5.05 A. M. The track was cleared at 5:35 and the train proceeded on its course at 5:40. This conductor left the train at 40th avenue at 6:30 or 6:40, and it was there taken in charge by another of defendant's conductors, and started for the Stock Yards. After going about 5 miles and reaching Brighton Park, which is about 2 miles from the Stock Yards, an air hose on one of the cars burst, causing a sudden setting of the brakes, and the pulling out of a drawbar on another car of the train. This necessitated the setting out of that car, and replacing the air hose, causing further delay of 28 minutes.

Various witnesses testified to having examined car No. 21239 prior to the pulling out of the drawbar, and that they observed nothing to indicate that the drawbar was defective. At the conclusion of the evidence for the Government, and again at the close of all the evidence, defendant moved the Court to instruct the jury to find a verdict for the defendant, which motion the Court denied. In the Court's charge to the jury it was stated that the jury had a right to consider the movement of the train from the point where the stock was received to the Chicago Stock Yards, in determining whether the defendant exercised due diligence to transport the stock within the 36 hours; that the Company may not lay out a slow schedule over a long distance, depending upon its ability, toward the end of the journey, to run in the stock within the 36 hour limit. To these portions of the Court's charge defendant took exception. The jury returned a verdict against defendant, and judgment was entered and fine imposed. It is stated in the record and in briefs of counsel that seven other suits are pending against the defendant in the District Court, depending upon these same facts, and which by stipulation between the parties are to be disposed of in like manner as the case at bar.

#### *Opinion by*

ALSCHULER, *Cir. J.*:

It is contended for plaintiff in error that the record herein discloses no evidence which would warrant the conclusions that plaintiff in error "wilfully" violated the 28 hour law.

That the term 'wilfully,' as employed in the Act, does not imply deliberate intent to do injury to the stock or to its owner, has been too frequently considered and definitely determined to require further demonstration. The jury may conclude that the violation was wilful, if from the evidence they find that the carrier in confining the stock beyond the statutory limit, manifested disregard of the law, or indifference toward its requirements. *Newport News, etc., Co. v. United States*, 61 Fed. 488, N. Y. Cent. R. R. Co. v. United States, 165 Fed. 833, *United States v. A. T. & S. Ry. Co. et al.* 166 Fed. 160, *United States v. U. P. R. R. Co.* 169 Fed. 65, *United States v. Atlantic Coast Line R. R. Co.* 173 Fed. 764, *C. B. & Q. R. R. Co. v. United States*, 194 Fed. 342, *O-W. R. & Nav. Co. v. United States*, 205 Fed. 337, *St. Louis, etc., Ry. Co. v. United States*, 209 Fed. 600, *Grand Trunk Ry. Co. v. United States*, 229 Fed. 116.

It was stipulated by the Company that the over-time of confinement of this stock was 3 hrs. and 5 min. It seems to be the theory of the plaintiff in error that if it appears that unavoidable accident delayed the train in its course for a period of time at least as long as the 3 hrs. and 5 min., a complete defense will have been made, and that it was error for the court to charge the jury it may take into consideration the whole period of confinement, in determining whether any of the excess over 36 hours was in violation of the statute, and whether in the exercise of due diligence by the carrier, the confinement should have terminated earlier than it did.

It is claimed that a delay of 2 hrs. 52 min. unavoidably occurred at Proviso through a pulled drawbar, and consequent derailment of a car, and another of 28 minutes at Brighton Park through a bursting air hose and resulting pulling out of another drawbar—making 3 hrs. 20 min. of unavoidable delay, but for which the stock presumably would have been unloaded 15 minutes before the expiration of the 36 hours.

The statute prohibits the carrier from confining the stock beyond the period fixed, without unloading into pens, etc., "unless prevented by storm or other accidents or unavoidable cause which cannot be anticipated or avoided by the exercise of due diligence and foresight." If the unloading is so prevented, the delay is excused; but if notwithstanding unanticipated and unavoidable delays the carrier ought nevertheless in the exercise of reasonable diligence to have unloaded the stock within the prescribed time, the delay will not relieve it from liability for confinement beyond that time. Delay in transportation may or may not necessarily delay the time of unloading, de-

61 pending upon the facts of each case. Suppose an instance where the shipper having consented to 36 hours' confinement, the time reasonably required to convey the stock from origin of shipment to unloading point was 10 hours, and that an excusable delay of 16 hours occurs in transportation; would this excuse the carrier in prolonging the confinement of the stock beyond the 36 hours? Plainly not, if in the exercise of due diligence the confinement, notwithstanding the delay, should not have exceeded 36 hours. In other words, since there were still 20 hours of the 36 in which to do what

reasonably required but 10, the over-time of confinement would not be attributable to the delay in transportation. And surely the delay of 16 hours in the transportation would not in and of itself give the carrier the right arbitrarily to prolong the confinement from the original 36, to 52 hours, wholly regardless of the time reasonably necessary to reach an unloading point, without incurring the penalty of the statute, if the confinement is wilfully and knowingly extended beyond 36, though within 52 hours.

So in the instant case, if conceding 3 hrs. 20 min. of excusable delay at Proviso and Brighton Park, the jury nevertheless found from the evidence that the confinement of the stock in question ought not, in the exercise of due diligence by the carrier, to have exceeded the 36 hours, or if exceeding 36, ought not to have been as long as 39 hrs. 5 min., its verdict would in that regard be justified.

In considering the question of whether all or any of the over-time of confinement was made necessary by the proved delays, and whether in the exercise of due diligence the carrier could have brought the stock to the unloading point in materially less than the time here in question, it was entirely proper for the jury to consider the confinement and transportation of this stock from inception to unloading, and this only is what the court's charge which is complained of, told the jury it might do. There was no error in this.

Was there any evidence from which the jury might reasonably have concluded that in the exercise of due diligence the carrier should have unloaded the stock within the 36 hours, or in any event within a period substantially less than the 39 hours of their confinement? In brief for plaintiff in error it is said, "The train was in Proviso 136 miles distant at 2:48 in the morning, or 8 hours and 43 minutes after leaving Clinton, having traversed that distance at an average speed of 15.7 miles per hour. At that point, but a very few miles from the

Stock Yards, they therefore had four full hours left." But 62 the stock was not unloaded till 9.05—6 hrs. 17 min. after reaching Proviso, 16 miles away. Deducting 3 hrs. 20 min. for the delays at Proviso, and Brighton Park, leaves 2 hrs. 57 min. clear running time which was consumed to make 16 miles, with a train carrying stock which had then already been confined 36 hours or more.

The purpose of the law being as declared in the Act "to prevent cruelty to animals while in transit," humanitarian considerations would suggest that, as the maximum period of confinement is approaching or passed, reasonable diligence on the carrier's part will require corresponding increase of effort to minimize further duration of the confinement.

The jury may have concluded that, conceding the delay of 3 hrs. 20 min. as claimed, the consuming of 2 hrs. 57 min. for a 16 miles run with stock which had already been confined by the same carrier since 6 o'clock P. M. of the second day before, manifested such a disregard for the statute as to afford sufficient evidence of its wilful violation. We cannot say that a verdict so based would be without evidence to support it, or a judgment given on such a verdict contrary to law.

And indeed the jury might from the evidence have concluded that yet another hour was wasted at Proviso, at which station at 2:48 A. M. the car in the train was derailed. The wrecker was at Palatine with its crew ready to go out on any such emergency. But the foreman of the crew testified that he did not get notice till 4, that he started at once, reached Proviso at 5:05, cleared the track at 5:30 so that at 5:40 the train proceeded. In these days of lightning communication, the jury might not improperly have found that under the circumstances, ordinary care did not admit of such delay in calling the wrecker, and that such hour or so of the delay of Proviso was neither necessary nor unavoidable.

We find no error in this record, and the judgment of the District Court is

Affirmed.

A true Copy.

Teste:

\_\_\_\_\_,  
Clerk of the United States Circuit Court of  
Appeals for the Seventh Circuit.

63 And afterwards, on the same day, to-wit: On the eighteenth day of April, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

TUESDAY, April 18, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. Christian C. Kohlsaat, Circuit Judge.

Hon. Julian W. Mack, Circuit Judge.

Hon. Samuel Alschuler, Circuit Judge.

Edward M. Holloway, Clerk.

John J. Bradley, Marshal.

Before:

Hon. Julian W. Mack, Circuit Judge.

Hon. Samuel Alschuler, Circuit Judge.

Hon. Albert B. Anderson, District Judge.

2294.

CHICAGO & NORTHWESTERN RAILWAY COMPANY

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District

of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

64 And afterwards, to-wit: On the eighteenth day of May, 1916, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Rehearing, which said Petition for Rehearing is not copied here nor made a part of this record.

And afterwards, to-wit: On the first day of June, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

THURSDAY, June 1, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Christian C. Kohlsaat, Circuit Judge, presiding.  
Hon. Julian W. Mack, Circuit Judge.  
Hon. Samuel Alschuler, Circuit Judge.  
Hon. Evan A. Evans, Circuit Judge.  
Edward M. Holloway, Clerk.  
John J. Bradley, Marshal.

Before:

Hon. Julian W. Mack, Circuit Judge.  
Hon. Samuel Alschuler, Circuit Judge.  
Hon. Albert B. Anderson, District Judge.

2294.

CHICAGO & NORTHWESTERN RAILWAY COMPANY

VS.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby overruled.

65 And afterwards, to-wit: On the fifth day of June, 1916, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Notice of Motion, and Motion, which said Notice and Motion are in the words and figures following, to-wit:—

In the United States Circuit Court of Appeals for the Seventh Circuit,  
October Term, A. D. 1915.

No. 2294.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Northern  
District of Illinois, Eastern Division.

To Charles F. Clyne, United States District Attorney, Chicago,  
Illinois:

Please take notice that on Wednesday, June 7th, 1916, at 10:00  
o'clock A. M., or on the coming in of the Court, or as soon thereafter  
as counsel can be heard, we shall appear before the above named  
Court in the room usually occupied by it as a Court room, in Chi-  
cago, and shall ask said Court to stay issuance of any mandate herein  
until the further order of the Court, at which time and place you  
may appear if you see fit.

C. A. VILAS,

*Attorney for Plaintiff in Error.*

Received a copy of the foregoing notice with motion and  
66 affidavit in support thereof, this 5<sup>th</sup> day of June, 1916.

CHARLES F. CLYNE,

*Attorney for Defendant in Error.*

In the United States Circuit Court of Appeals for the Seventh Circuit,  
October Term, A. D. 1915.

No. 2294.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Northern  
District of Illinois, Eastern Division.

*Motion.*

Now comes the plaintiff in error and prays the Court to stay the  
issuance of the mandate of this Court upon the judgment of affirm-  
ance in this cause until the further order of this Court.

C. A. VILAS,

*Attorney for Plaintiff in Error.*

In the United States Circuit Court of Appeals for the Seventh Circuit,  
October Term, A. D. 1915.

No. 2294.

67 CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff  
in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Northern  
District of Illinois, Eastern Division.

STATE OF ILLINOIS,  
*County of Cook, ss:*

C. A. Vilas, being first duly sworn, on oath deposes and says that the plaintiff in error in the above entitled cause has notified this affiant, one of the attorneys in charge of said appeal on behalf of plaintiff in error, that it intends to prosecute a petition for a writ of certiorari in the Supreme Court of the United States, for the purpose of reviewing the judgment in the above entitled case of Chicago and North Western Railway Company, plaintiff in error, vs. United States of America, defendant in error, General Number 2294, in the Circuit Court of Appeals for the seventh circuit, and has ordered this affiant to prepare whatever papers may be necessary to that end and to preserve its rights and the status quo of said judgment until said petition is decided.

C. A. VILAS.

Subscribed and sworn to before me this 5<sup>th</sup> day of June, 1916.

[SEAL.]

MARGARET C. CARMODY,  
*Notary Public.*

Endorsed: Filed June 5, 1916. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the seventh day of June, 1916, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

68

WEDNESDAY, June 7, 1916.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Christian C. Kohlsaat, Circuit Judge, presiding.

Hon. Julian W. Mack, Circuit Judge.

Hon. Samuel Alschuler, Circuit Judge.

Hon. Evan A. Evans, Circuit Judge.

Hon. Arthur L. Sanborn, District Judge.

Edward M. Holloway, Clerk.  
John J. Bradley, Marshal.

Before:

Hon. Julian W. Mack, Circuit Judge.  
Hon. Samuel Alschuler, Circuit Judge.  
Hon. Evan A. Evans, Circuit Judge.

2294.

CHICAGO & NORTHWESTERN RAILWAY COMPANY

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern  
District of Illinois, Eastern Division.

On motion of counsel for plaintiff in error, it is ordered that the  
mandate in this cause be, and the same is hereby stayed until the  
further order of this Court.

69 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court  
of Appeals for the Seventh Circuit, do hereby certify that the fore-  
going typewritten and printed pages, numbered from 1 to 15, in-  
clusive, contain a true copy of the proceedings had and papers filed  
(except the briefs of counsel and stipulation relating thereto, and the  
Petition for a Rehearing) in the case of Chicago & Northwestern  
Railway Company vs. United States of America No. 2294, October  
Term, 1914, as the same remains upon the files and records of the  
United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the  
seal of said United States Circuit Court of Appeals for the Seventh  
Circuit, at the City of Chicago, this seventeenth day of July A. D.  
1916.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,  
*Clerk of the United States Circuit Court of  
Appeals for the Seventh Circuit,*  
By FREDERICK G. CAMPBELL,  
*Deputy Clerk.*

70 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the  
Judges of the United States Circuit Court of Appeals for the Sev-  
enth Circuit, Greeting:

Being informed that there is now pending before you a suit in  
which Chicago & Northwestern Railway Company is plaintiff in

error, and The United States of America is defendant in error, No. 2294, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

71 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

72 In the Supreme Court of the United States, October Term,  
A. D. 1916.

No. 629.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

On Writ of Certiorari in the Circuit Court of Appeals, Seventh  
Circuit.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the transcript of the record of the District Court for the Northern District of Illinois, Eastern Division, and of the Circuit Court of Appeals for the Seventh Circuit, certified to by the Clerk of said court, and heretofore filed herein upon the application for the Writ of Certiorari, is the record in this case, and may be filed and used in this case as and for the return of the Clerk of said Circuit Court of Appeals for the Seventh Circuit, to the Writ of Certiorari herein.

WILLIAM G. WHEELER,

CHARLES A. VILAS,

*Counsel for Plaintiff in Error.*

JOHN W. DAVIS,

*Solicitor General.*

Endorsed: Filed Dec. 11, 1916. Edward M. Holloway, Clerk.

73 UNITED STATES OF AMERICA,  
*Seventh Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Chicago & Northwestern Railway Company, Plaintiff in Error, vs. United States of America, Defendant in Error, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this nineteenth day of December, A. D. 1916.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,  
*Clerk of the United States Circuit Court of  
 Appeals for the Seventh Circuit.*

[Endorsed:] File No. 25,459. Supreme Court of the United States, No. 629, October Term, 1916. Chicago & Northwestern Railway Company vs. The United States. Writ of Certiorari. Filed Dec. 11 1916. Edward M. Holloway, Clerk.

74 [Endorsed:] File No. 25,459. Supreme Court U. S. October Term, 1916. Term No. 629. Chicago & Northwestern Railway Company, Petitioner, vs. The United States. Writ of Certiorari and return. Filed December 22d, 1916.



Office Supreme Court, U. S.

FILED

AUG 21 1916

JAMES D. MAHER

CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 6  250

CHICAGO AND NORTH WESTERN RAILWAY COM-  
PANY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

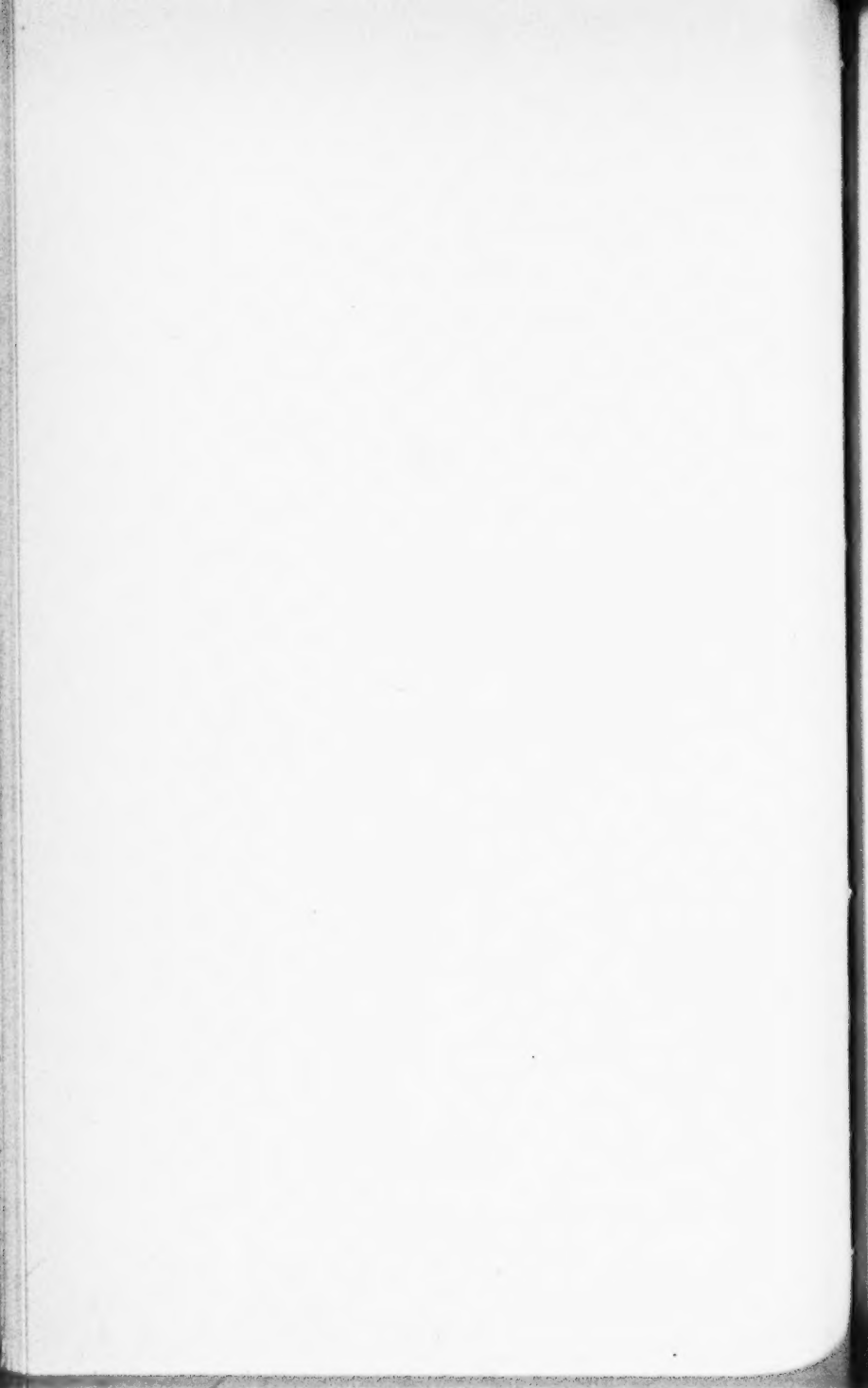
IN THE MATTER OF THE APPLICATION OF CHICAGO AND NORTH  
WESTERN RAILWAY COMPANY FOR A WRIT OF CERTIORARI TO  
THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI, AND  
BRIEF IN SUPPORT OF SAME.

WILLIAM G. WHEELER,

CHARLES A. VILAS,

*Counsel for Petitioner.*



IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

IN THE MATTER OF THE APPLICATION OF CHICAGO AND NORTH  
WESTERN RAILWAY COMPANY FOR A WRIT OF CERTIORARI TO  
THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITION FOR WRIT OF CERTIORARI.

---

*To the Honorable, the Chief Justice and Associate Jus-  
tices of the Supreme Court of the United States:*

The petition of Chicago and North Western Railway Company for a writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit and ordering that the record and exhibits in a certain cause be certified to this Honorable Court for final review and determination, according to law, said appealed cause being entitled as follows in the Seventh Circuit:—"Chicago and North Western Railway Company, Plaintiff in Error, *vs.* United States of America, Defendant in Error, No. 2294."

Your petitioner, said Chicago and North Western Rail-

way Company, respectfully shows to this Honorable Court as follows:

### I.

Your petitioner is, and at the time of the commencement of the action above referred to was, a railroad corporation organized and existing under and by virtue of the laws of the States of Illinois, Wisconsin and Michigan.

### II.

On the thirtieth day of December, 1913, the United States of America commenced an action in the United States District Court for the Northern District of Illinois, Eastern Division, against your petitioner, entitled, "*United States of America v. Chicago and North Western Railway Company*, No. 31454," alleging in its declaration, in substance, that your petitioner did knowingly and wilfully confine in cars a certain shipment of stock, contrary to the Act of Congress of June 29th, 1906, 34 Statutes at Large, 608, commonly known as the "Twenty-eight Hour Law."

### III.

Issue being joined in the said action trial was had thereof before said court and a jury, verdict of "Guilty" was returned and, after motion for new trial had been overruled, judgment was entered by said court on the verdict on June 30th, 1914.

### IV.

The undisputed evidence showed that the stock was confined 3 hours and 5 minutes above the time permitted by the statute; that the stock moved from Ringsted, Iowa, a distance of 440 miles, to Union Stock Yards, Chicago.

That between Clinton, Iowa, and destination the shipment was delayed for a sufficient time and due to causes which, under a proper instruction the jury was at liberty to find, and it was the duty of the jury to find, were beyond the power of the carrier to prevent and could not have been foreseen by the exercise of due diligence and foresight.

#### V.

In submitting the case the trial judge instructed the jury to the effect that their inquiry had to do with the transportation of this car of stock from the point of origin to destination; and, that if they believed that the Railway Company in the exercise of due diligence could have gotten the stock to destination within the time prescribed by the statute, notwithstanding the accidents proved by the defendant as its defense, they must find for the plaintiff; also, to the effect that it was the duty of the Railway Company to provide everything that human ingenuity could devise in the way of safeguards to get the stock to destination within the period limited by the statute, and that the Railway Company could not provide a slow schedule with the idea of getting to destination just within the time limit and then claim exemption from the penalties of the statute on account of an accident.

#### VI.

Exceptions to said charge were duly preserved by the defendant and said cause was taken to the Circuit Court of Appeals for the Seventh Circuit by writ of error; and said Circuit Court of Appeals affirmed the judgment of the District Court, as more particularly appears by certified transcript of said proceedings in said Circuit Court of Appeals filed herewith. Motion for rehearing of said

cause was by said Circuit Court of Appeals denied on the first day of June, 1916.

## VII.

The questions and propositions of law involved in this case are substantially as follows:

1. Whether the facts and circumstances proved by the defendant upon the trial of this case constitute as a matter of law an accidental or unavoidable cause "which can not be anticipated or avoided by the exercise of due diligence and foresight," within the meaning of the twenty-eight hour law, so as to entitle the defendant, upon proof of such facts and circumstances, to a directed verdict.

2. Whether having established such facts, which constitute as a matter of law an accidental or unavoidable cause which can not be anticipated or avoided by the exercise of due diligence and foresight, the defendant must further prove due diligence in the conduct of the shipment from the point of origin of said shipment to its destination, it appearing that, except for the accidents detailed above, said shipment would have arrived at its destination within the time limited by the statute.

3. Whether in determining whether or not the defendant has violated the statute, the jury may be permitted to consider the entire time consumed from the point of origin of the shipment to its destination, there being no evidence as to the usual and ordinary time consumed in running from Ringsted, Iowa, to Clinton, Iowa, or as to the conditions ordinarily attending the same.

4. Whether under the circumstances shown to exist in this case, the court correctly instructed the jury.

All of said questions were duly raised and argued by

your petitioner in said District Court and in the said Circuit Court of Appeals.

### VIII.

And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons, among others:

1. Because it was error for the trial court and for the Circuit Court of Appeals for the Seventh Circuit, to hold that the defendant had not made out a complete defense as a matter of law within the language of the statute above referred to.

2. Because it was error for the trial court and for the Circuit Court of Appeals to hold that in considering the defense offered, it was proper to consider the entire run from Ringsted to Chicago, regardless of the time and place and nature of the accident, which constituted the defense.

3. Because the questions of law involved herein have not been passed upon by this court.

4. Because the public interest and the interest of jurisprudence require the decision of this court upon the questions of law involved herein.

5. Because by stipulation there are seven other cases depending for their decision upon the final decision in this case, and in addition there are many other similar cases arising from time to time for which it is desirable to have a uniform rule of action.

6. Because said decision is at variance with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Chicago, Burlington & Quincy Railroad Company v. United States*, 194 Fed., 342.

WHEREFORE your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Seventh Circuit and cause the record in this case to be brought to this Honorable Court for final review and determination.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

By Edward M. Hyzer  
Vice President and General Counsel.

STATE OF ILLINOIS, }  
COUNTY OF COOK. } ss.

EDWARD M. HYZER, being first duly sworn, on oath deposes and says that he is Vice President and General Counsel for the Chicago and North Western Railway Company and makes this verification for and in its behalf and is thereunto duly authorized; that he has read the foregoing petition and that the same is true to the best of his knowledge and belief; that his knowledge and belief are derived from the record of this case, and from the reports of the attorneys who had charge of the same in the District Court and in the Circuit Court of Appeals.

Edward M. Hyzer

Subscribed and sworn to before me this 21<sup>st</sup>  
day of July, A. D. 1916.

Margaret C. Lamont  
Notary Public, Cook County, Illinois.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this court, and that said petition is not filed for delay.

William J. Wheeler  
Of Counsel for Petitioner.

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

IN THE MATTER OF THE APPLICATION OF CHICAGO AND NORTH  
WESTERN RAILWAY COMPANY FOR A WRIT OF CERTIORARI TO  
THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To Hon. Charles S. Clyne, Frederick Dickinson and John  
B. Boddie, Counsel for the above mentioned respondent;  
and to the above mentioned respondent:*

Please take notice that on the *sixteenth*  
day of October, 1916, upon the opening of court, or as  
soon thereafter as counsel can be heard, at the court  
room of the Supreme Court of the United States in the  
City of Washington, D. C., we shall present to the court  
the accompanying petition for the issuance of the writ of  
certiorari, to be directed to the United States Circuit  
Court of Appeals, Seventh Circuit, and shall ask that per-  
mission be given to file such petition and that the writ of  
certiorari be issued as in said petition prayed.

*William J. Wheeler*  
*Charles A. Kild*

*Counsel for Petitioner.*

STATE OF ILLINOIS, } ss.  
COUNTY OF COOK.

H. J. BERMAN, being first duly sworn, on oath says that he served the foregoing notice upon Charles S. Clyne and Frederick Dickinson personally at Chicago, Illinois, on the 4th day of August, 1916, by leaving copy thereof with each of said persons, and upon John B. Boddie by leaving a copy thereof with said Charles S. Clyne, said John B. Boddie not being found within the County of Cook and State of Illinois.

*H. J. Berman*

Subscribed and sworn to before me this 4th day of August, 1916.

*Margaret C. Kennedy*  
Notary Public

*Deal*

Service of a copy of the  
within petition is admitted  
this 7th day of August, 1916.

*Jos. W. Davis*  
Solicitor General

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

IN THE MATTER OF THE APPLICATION OF CHICAGO AND NORTH  
WESTERN RAILWAY COMPANY FOR A WRIT OF CERTIORARI TO  
THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.

*To the Honorable, the Chief Justice and Associate Jus-  
tices of the Supreme Court of the United States:*

This action was for violation of the "twenty-eight hour law." The defense was that unloading was prevented by "accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight." (Section 1 of Act of June 29, 1906, 34 Statutes at Large, 608.)

The stock in question was loaded October 4th, 1913, at 6 P. M., at Ringsted, Iowa, a station on the defendant's road 440 miles from Chicago, and was carried by the defendant over its road to the Union Stock Yards at Chicago, where it was unloaded at 9:05 A. M. October 6th, having been confined in the car continuously for 39 hours and 5 minutes. The shipper had agreed to 36 hours of confinement and the overtime was, therefore, 3 hours and 5 minutes.

There is no evidence as to the conduct of defendant in transporting this car between Ringsted and Clinton, Iowa. At Clinton, it is shown by undisputed evidence, full and careful inspection was made of the draft rigging and other appliances of the car in question and of the car which later on caused the accident hereinafter referred to. Other inspections were made between Clinton and Chicago. The car containing the stock left Clinton at 6 P. M. October 5th, having twelve hours in which to reach the Union Stock Yards at Chicago within the time permitted by the statute and the 36 hour release. The time usually occupied for this journey is nine hours and it is sometimes done in six hours. At about 2:48 A. M. the train was at Proviso, a distance of about seven miles from the Union Stock Yards, with slightly over three hours of the time left. A drawbar in the fifth car from the engine, which had been inspected at Clinton and at intermediate points, pulled out while the train was running slowly under normal conditions, fell upon the track and caused the derailment of the car following. The car involved in this suit was near the rear of the train and was not damaged in this accident, but on account of the derailment was necessarily delayed while the said car was rerailed, until 5:35 A. M., two hours and fifty-seven minutes.

The train then proceeded through the Chicago Terminal District toward the Stock Yards, but met with a further delay of 28 minutes at Brighton Park by reason of the bursting of an air hose near the rear of the train, which caused the air brakes to set upon the rear end of the train sooner than on the front end and thus caused another drawbar to be pulled out near the front end of the train. This made a total delay of three hours and twenty-five minutes.

The circumstances of these accidents and of the inspection of the cars involved therein were in no way disputed or rebutted by the Government, nor was the testimony of the defendant's officers disputed, that the breaking of drawbars and the bursting of air hose are accidents which can not be anticipated and which at times occur, in spite of the most rigid inspection, in the prudent operation of railroads.

The theory upon which the trial court submitted the case to the jury was that the accidents in question, if found to have occurred as alleged, would excuse the delay, provided that due diligence and foresight had been exercised by the defendant *all the way from the point of origin in Iowa to Chicago* to get the stock unloaded within the time limited. The jury were expressly told that their inquiry was not limited to the accidents which occurred at Proviso and Brighton Park, but that they must consider the conduct of the defendant throughout the entire run, and the court said:

"Of course it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get into destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have *skinned* in within the thirty-six hour limit they are excused; that is not the law."

The court also said:

"This inquiry is not merely whether or not, at Proviso, the thing was done which good railroading would require to be done to get this car, which the evidence shows was wrecked, back on the track and in condition to permit the movement; this inquiry is not merely whether or not, where this air hose broke, at Brighton Park, the Railroad Company did what a railroad company ought to do,—what good railroading requires to be done to reduce delay and provide

movement at Brighton Park. Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company, by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company.

Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier." (pages 37, 38.)

The Circuit Court of Appeals, speaking through Judge Alschuler, held that there was no error in the charge of the court and expressly adopted the theory of the trial court, saying on page 3 of the opinion:

"If the unloading is so prevented (*i. e.*, by unavoidable accident), the delay is excused; but if, notwithstanding unanticipated and unavoidable delays the carrier ought, nevertheless, in the exercise of reasonable diligence to have unloaded the stock within the prescribed time, the delay will not relieve it from liability for confinement beyond that time."

The effect of this decision is to read into the 28-hour law something which was not put there by Congress. Our understanding of the law has always been that an absolute duty is imposed, which is not discharged by the exercise of ordinary care. Section 1 of the act provides,

in substance, that no railroad, etc., shall confine cattle, etc., in cars for a period longer than twenty-eight consecutive hours, without unloading for rest, water and feeding for a period of at least five consecutive hours, "unless prevented by storm or by other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight."

Section 3 of the act imposes a penalty of from one to five hundred dollars upon any carrier "who knowingly and wilfully fails to comply with the provisions of the two preceding sections."

The law contains an absolute prohibition of *knowing and wilful* excessive confinement coupled with a recital of circumstances which will excuse such excessive confinement.

To say, therefore, that after a carrier has established by undisputed evidence that compliance with the law was prevented by an accidental or unavoidable cause, which could not be anticipated or avoided by the exercise of due diligence and foresight, it must then go further and show that it exercised throughout the entire journey due diligence and foresight, is to add to the burdens imposed upon the carrier by the act, and by judicial construction to read into the act that which is not there. The law says that the carrier shall not confine the cattle longer than the prescribed time, unless prevented by an unavoidable accident. The proving of an unavoidable accident preventing compliance with the act is, therefore, a complete defense, and the carrier can not be further required to prove due care *throughout the entire journey*, nor is it required to defend its train schedules and its operating methods, or to adjust the same with reference to the possibility of accidents such as happened. The holding in this case, in effect, requires railroad companies to an-

ticipate derailments and accidents such as occurred, and to arrange their schedules accordingly. The impossibility of such a thing must be apparent, without argument. If every freight train must be run in the anticipation of its being wrecked by drawbars coming out, in spite of rigid inspection, railroading as it is known to-day would be impossible.

A railroad company has the right to fix reasonable schedules, without reference to or anticipation of delays by extraordinary accidents, and it may also control its trains while in transit, provided they be kept reasonably within their schedule. For example, the train in question might have been sidetracked for a half an hour, or for a longer period, to permit passenger trains to pass,—a practice customary and necessary in railroading. It may also have been stopped for the purpose of completing loading of certain of the cars or for various other causes incident to the operation of a railroad; and, provided due attention was given to the arrival of the stock shipment within the period prescribed by law and proper time for such prompt arrival was allowed in accordance with the established schedules, the conduct of the railroad company in such matters is not open to question in a case such as this. Here it is shown that defendant had three hours in which to carry the cattle seven miles without a violation of the statute. There is no suggestion in the case that the defendant intended to just “skin in” within the time limit. Notwithstanding the remarks of the trial judge, the defendant had a right to unload the cattle within one minute of the expiration of the thirty-six hours, and no penalty could be imposed upon it for so doing.

Having shown by undisputed evidence that up to the moment of the accident the train was well within its schedule and that failure to arrive within the time limit

was caused solely by these unforeseen accidents, a complete defense was made out and inquiry as to the amount of care exercised in the detail of the transportation prior to the accident is entirely irrelevant.

Had this delay in unloading been caused by an unforeseeable cloud-burst, washing out the track, it could scarcely be claimed that inquiry should be made as to the conduct of the transportation prior to the cloud-burst, instead of as to whether or not the storm was foreseeable by due diligence. Yet such would necessarily be the ruling if the present case is to be a precedent. It is plain that no such thing was intended by Congress when the law was enacted.

The Circuit Court of Appeals for the Eighth Circuit has held that a defense such as was interposed in this case brings the defendant within the exceptions in the first section of the act.

*Chicago, Burlington & Quincy Railroad Company v. United States*, 194 Fed., 342.

This has been followed by the District Court of Massachusetts in

*United States v. Boston & Maine Railroad Company*, 228 Fed., 915.

The present case was tried by the defendant with the view of making a case similar to that in the Eighth Circuit, and the ruling of the court is in direct conflict with the decision in the Eighth Circuit. In that case delays were caused by drawbars pulling out and there was undisputed testimony of inspection; also, that it is impossible to prevent such occasional accidents and no train dispatcher could calculate when a train might be delayed thereby. The accidental or unavoidable cause mentioned in the statute was defined by that court to be "a cause

which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid." The court's conclusion was that a preponderance of the evidence showed that the railroad company was prevented from unloading within the time limit "by accidental causes which could not be anticipated or avoided by that due diligence and foresight which reasonably prudent and careful men ordinarily exercise in like circumstances, and that there was not only no conclusive, but no substantial, evidence that it knowingly and wilfully failed to comply with the law."

In *United States v. Boston & Maine Railroad*, *supra*, two distinct engine failures occurred to cause delay and prevent unloading within the time, and the delay was further lengthened by the train getting into the suburban district and having to sidetrack for passenger trains. The first cause, a hot box on the first engine, and the second cause, leaks in the boiler in the second engine, were held by the court to constitute "accidental or unavoidable causes" and judgment was rendered for the defendant.

In the instant case causes equally unforeseeable and unavoidable were shown by *undisputed evidence* and it was shown that said causes were what prevented unloading within the time limit. Nevertheless, the decision declines to recognize the defense provided by the statute as an exception and imposes upon the defendant the necessity of making additional defenses not contemplated by the statute, and permits the jury to consider the circumstances of the early part of the journey, which have absolutely no causal connection whatsoever with the violation of the statute and which admittedly were in ac-

cordance with established schedules and methods. The case is, therefore, at variance with the decision of the Eighth Circuit, which has already been adopted as a precedent.

*United States v. Phila. & Reading Ry. Co.*, 223 Fed., 207.

*United States v. Lehigh Valley Ry. Co.*, 204 Fed., 705.

#### CONCLUSION.

In conclusion your petitioner respectfully submits that the foregoing petition for the writ of certiorari should be granted and the record in this case sent up for final review and determination by this court, inasmuch as the question is one of importance and gravity, involving in this litigation eight separate causes of action and being determinative of conduct of railroad carriers throughout the country.

*Law Ow Bew v. United States*, 144 U. S., 47.

Respectfully submitted,

William G. Wheeler

Charles A. Kilax

Counsel for Petitioner.

Office Supreme Court, U. S.  
FILED

OCT 13 1917

JAMES D. MAHER,  
CLERK.

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1916.

No. **629** 250

CHICAGO AND NORTH WESTERN RAILWAY CO.,  
*Petitioner,*  
*vs.*

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT.

**BRIEF AND ARGUMENT FOR PETITIONER.**

WILLIAM G. WHEELER,  
CHARLES A. VILAS,  
*Counsel for Petitioner.*

(25,459)



## SUBJECT INDEX.

	PAGE.
Statement of the Case.....	1
Inspection . . . . .	5
Errors Relied Upon.....	9
Brief of Argument.....	12
Argument . . . . .	14
The Instructions . . . . .	22
Appendix . . . . .	27

## INDEX TO CASES CITED.

	PAGE.
C. B. & Q. R. R. Co. v. U. S., 194 Fed., 342.....	12, 13, 15, 18, 21
M. K. & T. R. Co. v. U. S., 178 Fed., 15.....	13
Oregon & Washington R. R. & N. Co. v. U. S., 205 Fed., 341.....	13
St. L. & S. F. R. R. Co. v. U. S., 169 Fed., 69.....	12, 15
St. Joseph Stock Yards Co. v. U. S., 187 Fed., 104.....	12
St. L. M. B. T. R. R. Co. v. U. S., 209 Fed., 600.....	13, 15, 20
U. S. v. Kansas City Southern Ry. Co., 189 Fed., 481.....	12
U. S. v. A. T. & S. F. Ry. Co., 166 Fed., 160.....	12
U. S. v. Boston & Maine R. R. Co., 228 Fed., 915.....	12, 21
U. S. v. Union Pacific R. R. Co., 169 Fed., 65.....	12
U. S. v. Union Stock Yards Term. Ry. Co., 178 Fed., 19.....	12
U. S. v. Lehigh Valley Ry. Co., 204 Fed., 705.....	12
U. S. v. Philadelphia & Reading Ry. Co., 223 Fed., 211.....	13
U. S. v. Philadelphia & Reading Ry. Co., 223 Fed., 207.....	13



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1916.

---

**No. 629**

---

CHICAGO AND NORTH WESTERN RAILWAY CO.,  
*Petitioner,*  
*vs.*

THE UNITED STATES.

---

Writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court, affirming a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division (Honorable Kenesaw M. Landis, Judge) for one hundred dollars penalty, in an action by the United States under the "28-Hour Law" Act of June 29, 1906, Chapter 3594, 34 U. S. Statutes at Large, 607.

STATEMENT OF THE CASE.

---

The declaration in this case sought to recover a penalty of Five Hundred (\$500.00) Dollars from the defendant

(plaintiff in error) for confining on the fourth, fifth and sixth days of October, 1913, a carload of hogs for more than thirty-six consecutive hours, to wit, thirty-nine hours and five minutes, without unloading.

The defendant pleaded the general issue and the case was tried in the District Court on the 6th and 7th days of November, 1914, before a jury which rendered a verdict of guilty. Thereafter, after motion for new trial had been denied and on the 30th day of June, 1915, judgment was entered by the said District Court against the defendant for One Hundred (\$100.00) Dollars and costs.

A writ of error to review this judgment was taken to the Circuit Court of Appeals for the Seventh Circuit and an opinion and decision affirming the judgment of the District Court was rendered April 18th, 1916, reported 238 Fed. Rep., 234. To review that judgment this writ of certiorari has been allowed.

At the opening of the trial it was announced that seven other cases arising upon the same Statement of Fact are pending in the District Court and it was agreed that the same judgment shall be entered in each of those seven as is finally entered in this case. In other words in trying this case, eight cases are disposed of. (Trans., 6.)

It was admitted by the defendant that the stock in question was loaded at six o'clock in the evening of October 4th, 1913, and unloaded at 9:05 A. M. on October 6th, 1913, thirty-nine hours and five minutes after the time it was loaded. (Trans., 6.) Upon this admission and upon the waybill, "wide-awake" report and thirty-six hour extension request, which are brought into this court as separate exhibits, the Government rested its case.

The defense of the Railway Company was that delivery within thirty-six (36) hours was prevented by

“accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.” (34 U. S. Stat., 607.)

The unavoidable causes relied upon were, (1) the pulling out of a drawbar when the train was almost in Chicago, causing the derailment of a car and the delay of the train for about three hours; (2) the bursting of an air hose at a subsequent period about two miles from the Union Stock Yards, causing another drawbar to be pulled out and a further delay of twenty-eight minutes. The testimony offered by the defendant as to the facts relative to these accidents, is wholly uncontradicted and we shall therefore attempt, with appropriate references to the transcript, to compile a narrative of the movement of the cars involved, without attempting to state in detail the testimony of each witness as it was given.

The car involved in the suit was C. & N. W. live stock car No. 4999 and was shipped from Ringsted, Iowa, to the Union Stock Yards, Chicago. Ringsted, Iowa, is about four hundred and thirty-eight miles from Chicago and is three hundred miles from Clinton, Iowa, which latter point is one hundred and thirty-eight miles from Chicago. (Trans., 29.) The record is silent as to the history of the movement of this car from Ringsted to Clinton. It was loaded at Ringsted on October 4th, 1913, at six P. M. and it left Clinton, Iowa, on October 5th at six P. M., having then been on the road twenty-four hours and having traveled three hundred miles of the distance to Chicago. (Trans., 28 and 7.) At the latter time it was the forty-sixth car in the train. (Trans., 28.) The usual running time from Clinton to Chicago for trains of this kind is nine hours, but it has been done in six hours. (Trans., 8.) This train therefore, leaving

Clinton at six P. M., had twelve hours, or until six A. M. of the day following in which to make its run and deliver the stock within the thirty-six hours limit.

At Nelson, Illinois, ninety-one miles from Chicago, at about eight-thirty P. M. this train picked up four or five additional cars of stock, among them car No. 21239, which was about the fifth car from the locomotive. (Trans., 7 and 28.) It was this car which subsequently caused the accident at Proviso, Illinois.

At 2:48 A. M., while this train was passing through Proviso, a point about 16 miles from the Union Stock Yards (and with slightly over three hours still left of the thirty-six in which to finish the run), a drawbar came out of the rear end of car No. 21239, fell upon the track and derailed the car following. (Trans., 8.) The train at that time was moving in the usual way and there was no unusual jolt or movement or any improper working of the engine or improper application of the air, or anything else to cause unusual strain. (Trans., 8.)

For the reason that the front trucks of the derailed car were at a considerable angle to the tracks and blocked both main tracks, it was impossible to rerail this car without the aid of a steam wrecker. The steam wrecker at that time was at Palatine, Illinois, about forty miles distant. It was sent for by telegraph, left promptly upon receipt of orders and arrived at the scene of the wreck at 5:05 A. M. The car was rerailed by the steam wrecker and the train proceeded again at 5:40 A. M. It would have taken much longer to have rerailed the car by means of jacks and there would have been danger of tipping the car over with its heavy load of live stock. (Trans., 16.) The wrecking foreman was unable to assign a cause for the pulling out of the drawbar. There are many cases where the reason cannot be determined by inspection of

the drawbar after the accident. There are very frequent cases when it is impossible to give the reason for the break. (Trans., 16.)

After the train had proceeded as far as Brighton Park, about a mile and a half from the Union Stock Yards, a further delay of twenty-eight minutes was caused by reason of an air hose bursting on the 22nd car ahead of the way-car, M. & St. L. car No. 34263, the 29th car in the train. This resulted in throwing on the air brakes in emergency and creating an unusual strain at the rear part of the train. As the result of this another drawbar was pulled out near the head end of the train. (Trans., 17.) The bursting of an air hose is something that cannot be anticipated or prevented and there are no precautionary measures to be taken to prevent such an accident. No one can tell from inspection when an air hose is going to burst. (Trans., 18.) The accident taking place near the rear end of the train caused the air to set at the rear end first and created a heavy strain upon the front end of the train from the locomotive. This heavy strain may reasonably be expected to cause a drawbar to come out. (Trans., 18.)

#### INSPECTION.

In addition to proving the accidents above described the defendant also proved thorough and careful inspection of the train in two methods; first, by regular inspectors at Clinton, Iowa; second, by the train crew, en route.

The inspection at Clinton, Iowa, was proved by Mr. Thomas Donahoe, Chief Inspector ((Trans., 20, 22, 27) and two assistants, J. G. O'Brien (Trans., 21 and 27) and M. H. McCune (Trans., 26).

Car No. 21239 (the one which caused the first accident) came into Clinton in the afternoon of October 5, on train

No. 114. (Trans., 24.) This train was inspected in the usual way and the record of the inspection was introduced in evidence.

The record consists of three books which were too bulky to attach to the record and are in this court in the custody of the marshal as separate exhibits. The method of inspection applied to this train was for two inspectors to examine the train, one on each side; examination of all the running gear was made, including the drawbars. If any defects were found they were either repaired or the car was tagged as bad order and set out for repair, and a note thereof made by the inspectors, which note was ultimately transcribed into the books which are in evidence.

The books show that the train was inspected and that a new brass was put into the caboose of the train, but contained no other entry of any defects in that train. If there had been any they would have been noted in the books. The inspection if made after dark was made with the aid of lanterns with reflectors and was such as would have disclosed any defects in the draft rigging. (Trans., 20.)

Car No. 21239, after arriving in Clinton on train No. 114 and being inspected, left Clinton and proceeded as far as Nelson, Illinois, at which point it, with some other cars, was set out, the reason appearing to be that the train was a heavy train and was not making the required time. (Trans., 24.) These cars, so set out, were later picked up by the train containing car No. 4999 (the car involved in this suit) and were by that train carried into Chicago.

The conductor of the latter train inspected the car in question at Nelson, Illinois, and the train was regularly inspected by its crew at all stops made for coal and

water. (Trans., 10.) The usual method of inspection by the train crew is either to walk along the train while coal and water are being taken and examine the riggings of the cars with a lantern, or to stand while the train is slowly pulling by them and examine them in the same way. This examination is the usual method and is sufficient to discover any defects which may exist either in the brakes, running gear or draft gear. The conductor of this train testified (Trans., 8 and 9):

“You can examine all draft rigging and brake rigging that is running with the cars sufficiently to see if anything is out of place. \* \* \* As an experienced railroad man I think I could make an examination of the draft mechanisms on each one of these cars sufficiently to be of value.”

The conductor who took car 21239 out of Clinton, also inspected the train between Clinton and Nelson before setting out the cars. He did this himself by walking clear around the train on both sides and looking over all the coupling apparatus and did not discover anything wrong with any of the cars. (Trans., 24.)

We have not attempted to set forth in detail the testimony of each member of the various train crews concerned in the movement of this car but with one exception every trainman concerned in the movement of the car in any train between Clinton and Chicago was called to the stand and testified as to his part in the inspection of the train. The only exception was the head brakeman of the train involved in the suit who is out of the service of the company and could not be found. (Trans., 10.)

Furthermore, the engineer of each train which handled this car between Clinton and Chicago, was called to the stand and testified that the train was handled carefully, that it was started slowly after taking up the slack and was not jerked or jarred in any way which would tend to weaken the draft rigging of the cars. (See testimony

of H. H. Wilson, Trans., 11, and A. C. Johnston, Trans., 25.)

Summarizing the foregoing, the following facts are established by the undisputed evidence:

1. The car in question left Ringsted, Iowa, at 6 P. M., October 4, 1913, with thirty-six hour release.
2. It left Clinton, Iowa, at 6 P. M., October 5, with twelve hours of the thirty-six still left.
3. The usual running time from Clinton to Chicago is nine hours and it has been done in six.
4. The car was within 16 miles of destination at 2:48 A. M. when the accident occurred.
5. The car which caused the accident at Proviso was inspected by two inspectors at Clinton, Iowa, before it left there and at least three times en route between Clinton and Chicago, and no defects were found.
6. There were no unusual delays between Clinton and Proviso.
7. The shipment was delayed two hours and fifty-two minutes at Proviso by the pulling of this drawbar, an accidental and unavoidable cause which could not have been anticipated or avoided by the exercise of due diligence and foresight.
8. Such accidents occasionally happen in the operation of a railroad and cannot be assigned to any definite cause.
9. A further delay of twenty-eight (28) minutes was caused at Brighton Park by the bursting of an air hose and the consequent pulling of another drawbar.
10. This accident could not be foreseen or guarded against.
11. These trains were at all time properly handled by the engineers in charge of them.

12. The delays above described were the cause of the excessive confinement of the cattle.

#### ERRORS RELIED UPON.

1. The court refused to direct a verdict for defendant at the close of all the testimony. (Trans., 29.)
2. The court erred in overruling motion for new trial. (Trans., 31.)
3. The court erred in fining the defendant and entering judgment upon the verdict for \$100.00 and costs.
4. The court erred in giving to the jury the following instructions:

“The language of this statute providing for the limitation, and including the clause which provides the excuse for confinement in the case of confinement beyond the time fixed by the limitation says, in substance, that the carrier shall be excused when it is prevented from complying with the statute by storm or accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. So, it presents to you the question for determination on this fact: Whether or not this car of stock by the exercise of due diligence by this railway company, the carrier, could have been transported from its point of origin out in Iowa, to destination, Union Stock Yards, within thirty-six hours. This inquiry is not merely whether or not, at Proviso, the thing was done which good railroading would require to be done to get this car, which the evidence shows was wrecked, back on the track and in condition to permit the movement; this inquiry is not merely whether or not, where this air hose broke, at Brighton Park, the railroad company did what a railroad company ought to do,—what good railroading requires to be done to reduce delay and provide movement at Brighton Park. Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company,

by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company. (Trans., 29.)

5. The court erred in giving to the jury the following instruction:

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier." (Trans., 30.)

6. The court erred in giving to the jury the following instruction:

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work, or the division superintendent's work, but the whole thing involved in the transaction or operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say, whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to

market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safeguards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course, it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six hour limit they are excused; that is not the law." (Trans., 30.)

7. The court erred in giving to the jury the following instruction:

"But that is not the limit of your inquiry. You may consider the evidence in this case as to the movement of this stock from origin to destination, considering the entire time taken up at various places where the evidence shows there were stops, and you are authorized to find under the evidence whether if you please, it measures up to the standard of due diligence exercised by this defendant in accomplishing the thing with a view to obeying the law. You are authorized to find that the delay is excused by these two accidents. If you find on the evidence in this case that the accidents happened, and that the lost time they occasioned is as testified by the defendant's witnesses, that, as everything else in this matter in the way of evidence is for your ultimate determination." (Trans., 31.)

## BRIEF OF ARGUMENT.

## I.

The trial court should have directed a verdict because it was established by the undisputed evidence that the unloading of the cattle in car No. 4999 within the time prescribed by the law, was prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.

*C. B. & Q. Railroad Co. v. United States*, 194 Fed., 342.

*United States v. Kansas City Southern Railway Company*, 189 Fed., 471.

*United States v. Atchison, Topeka & Santa Fe Railway Company*, 166 Fed., 160.

*United States v. Boston & Maine Railroad Co.*, 228 Fed., 915.

## II.

The penalty can be imposed only for such violations of a statute as are shown to be "knowing and willful."

*U. S. v. Atchison, Topeka & Santa Fe Ry. Co.*, 166 Fed., 160.

*U. S. v. Union Pacific R. R. Co.*, 169 Fed., 65.

*St. L. & S. F. R. R. Co. v. U. S.*, 169 Fed., 69.

*C. B. & Q. R. Co. v. U. S.*, 194 Fed., 342.

*U. S. v. Union Stock Yards Term. Ry. Company*, 178 Fed., 19.

*St. Joseph Stock Yards Company v. U. S.*, 187 Fed., 104.

*U. S. v. Lehigh Valley Ry. Co.*, 204 Fed., 705.

- Oregon & Washington R. R. & Navigation Co.*  
v. *U. S.*, 205 Fed., 341.  
*St. L. M. B. T. R. R. Co. v. U. S.*, 209 Fed., 600.  
*U. S. v. Philadelphia & Reading Ry. Co.*, 223  
Fed., 211.  
*U. S. v. Philadelphia & Reading Ry. Co.*, 223  
Fed., 207.  
*M. K. & T. R. Co. v. U. S.*, 178 Fed., 15.

## III.

The only question for the jury under the evidence was whether unloading within the time prescribed was prevented by "accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight"; and the charge of the court, submitting to the jury the question as to whether the defendant, aside from the accidents proved, exercised due diligence and foresight in laying out its schedule and getting the cattle to destination, and in permitting the jury to consider the entire journey from point of origin to destination, was therefore erroneous. (Trans., 30 and 31.)

*Chicago, Burlington & Quincy Railroad Co. v. United States*, 194 Fed., 342.

## ARGUMENT.

The foregoing specifications of error give rise to two main points, first, the court should have directed a verdict for defendant on the ground that a complete defense had been made; second, the court erred in his charge to the jury.

## I.

The statute is set forth in full at the end of this brief and it will be seen that the first section thereof positively forbids confinement of cattle in cars for longer than twenty-eight (28) hours without unloading, feeding and resting, except that upon written request from the owner, the time may be extended to thirty-six (36) hours; the thing prohibited is the continuous confinement of cattle in cars longer than the period specified. Proof therefore of such excessive continuous confinement shows a violation of the provisions of Section 1.

There is, however, an exception embodied in Section 1 in the following language:

“Unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight.”

The defendant in this case undertook to show that unloading was prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence or foresight. The evidence which it submitted to establish its defense was not contradicted in any particular by any witness. If, therefore, it showed so clearly as to leave no ground for reasonable minds to differ, that the unloading was so prevented, it was the duty of the trial court to direct a ver-

diet of not guilty. Before proceeding to discuss the evidence in detail, however, let us first consider Section 3 of the Act.

The second section of the Act relates to the feeding of the animals after their unloading and is not material here.

Section 3 provides, in effect, that any railroad company "who knowingly and willfully fails to comply with the provisions of the two preceding sections" shall be liable for a penalty. Here we have a further limitation upon Section 1. The failure to do that which is prohibited by Section 1 gives rise to a cause of action in a civil suit for penalty, only if the failure is knowing and willful. The word "knowingly" presents little difficulty of definition. The word "willfully" has been defined as meaning "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements."

*St. Louis & Santa Fe Railway Co. v. United States*, 169 Fed., 69.

*Chicago, Burlington & Quincy R. R. Co. v. United States*, 194 Fed., 342.

The Circuit Court of Appeals for the Seventh Circuit has approved this definition.

*St. Louis & S. F. Railway Co. v. United States*, 169 Fed., 69.

The plaintiff in error claims in this case that the evidence shows conclusively that the unloading enjoined by Section 1 of the Act was prevented by an accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight, and, further, that the confinement in excess of the time

prescribed was neither knowing nor willful. The uncontradicted evidence shows that the train conveying the cars involved in this suit, left Clinton, Iowa, one hundred thirty-eight miles distant from Chicago with twelve full hours in which to make a run which ordinarily consumed but nine and had been made in six hours; that during the journey from Clinton to Proviso the cars composing the train had been carefully inspected by competent men and that no discoverable defects had been noted; that the train arrived at a point but 16 miles from its final destination with three hours and twelve minutes of the lawful time still left; that notwithstanding the careful inspection by trained inspectors at Clinton, Iowa, and by the train crew frequently upon the way in, a drawbar pulled out and caused an accident which occasioned a delay of two hours and fifty-two minutes; that a further delay of twenty-eight minutes, making a delay in all of three hours and twenty minutes took place at Brighton Park from causes which were equally unforeseeable; and that these unforeseeable accidents were the proximate and controlling causes which prevented the unloading of the cattle within the time. Taking all intendments against the railroad company and assuming that it would have taken as long at three o'clock in the morning to traverse the Chicago terminals as it did three hours later, the cattle would have arrived and been unloaded fifteen minutes before the expiration of the thirty-six hours, if it had not been for these two unavoidable accidents. The record therefore distinctly shows that the unloading was prevented by accidental or unavoidable causes as provided in the first section of the statute, and there was nothing for the trial judge to do therefore, but to direct the verdict for the defendant. He was not concerned with the question of negligence or with the question of the care which the defendant exercised in the early part

of the run, or in laying out its schedule, for the defendant is not required to lay out its schedule with reference to accidents which it cannot foresee or avoid in the exercise of due diligence and foresight. The railroad company was authorized to operate its trains with reference to its daily custom and so long as the cattle were unloaded within the thirty-six (36) hour period, be it only one minute prior to the expiration thereof, the defendant was within the law.

## II.

The record shows with clearness that the failure to comply with the requirements of Section 1 was neither knowing nor willful. So far as the diligence of the defendant's employees could ascertain, everything about the trains involved was in proper running order and free from defect. Frequent and careful inspections were made, and great care seems to have attended the making of these inspections. There is no opportunity to claim from the evidence that the accidents which have been shown to have been the cause of the delay, were willfully brought about, or that the delay occasioned thereby was purposely or obstinately occasioned by the defendant, or that the attitude of the defendant in this case was that of a carrier "who having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements." Quite the contrary attitude on the part of this carrier is shown by the evidence. There is no claim of an intentional disregard of the statute, or a deliberate one, and certainly no indifference to the plain requirement of the law can be deduced from the testimony in this case. Giving the testimony the construction least favorable to the railroad company warrants a finding that the failure to comply with Section 1 of the Act was neither knowing nor willful.

The Circuit Court of Appeals for the Eighth Circuit has passed upon a case very similar to this one. (*Chicago, Burlington & Quincy Railroad Company v. United States*, 194 Fed. Rep., 342.) In that case during a run usually requiring eleven hours a delay of over two hours was caused by a series of accidents consisting of broken drawbars and knuckles of one of the automatic couplers in the train slipping by and causing the train to break in two. In commenting upon this situation, the Circuit Court of Appeals said:

“There is no evidence that any of these delays were caused by the negligence of the company, or of its servants. There is undisputed testimony that the sheep train and its drawbars were inspected at Alliance, and that they were in good condition, that drawbars sometimes pull out and knuckles in automatic couplers sometimes slip by, that it is impossible to prevent such occasional accidents, and that the train dispatcher could not, from his practical experience, undertake to calculate when a train would be delayed by reason of the pulling out of drawbars. Such an unusual series of accidents, the pulling out of three drawbars, the breaking of a chain, and the slipping of a knuckle, causing three successive delays, is not the natural and probable effect of running a freight train eleven hours, and hence it is not conclusive proof of a lack of due diligence and foresight for the operators of trains to fail to anticipate it and to run the train on the theory that it will not occur.”

The conclusion reached by the court was that:

“The preponderance of the evidence in this case was that the railroad company was prevented from unloading these sheep within the thirty-six hours by accidental causes which could not be anticipated or avoided by that due diligence and foresight which reasonably prudent and careful men ordinarily exercise in like circumstances, and that there was not only no conclusive, but no substantial evidence that it knowingly and willfully failed to comply with the law.”

The judgment of the court below in favor of the Government was reversed and the case remanded for a new trial.

The Circuit Court of Appeals for the Seventh Circuit in the case at bar reached a conclusion opposite to that just quoted. Referring to the exception in the first section of the Act, the court said:

“If the unloading is so prevented, the delay is excused; but if notwithstanding unanticipated and unavoidable delays the carrier ought nevertheless in the exercise of reasonable diligence to have unloaded the stock within the prescribed time, the delay will not relieve it from liability for confinement beyond that time. Delay in transportation may or may not necessarily delay the time of unloading, depending upon the facts of each case.” (Trans., 47.)

And further on they say:

“If conceding three hours twenty minutes of excusable delay at Proviso and Brighton Park, the jury nevertheless found from the evidence that the confinement of the stock in question ought not, in the exercise of due diligence by the carrier, to have exceeded the thirty-six hours, or if exceeding thirty-six, ought not to have been as long as thirty-nine hours five minutes, its verdict would in that regard be justified.” (234 Fed., 270.)

What the court said in the quotation first above made was in effect that if the unloading is prevented by accidental or unavoidable causes which could not be foreseen in the exercise of due diligence and foresight, the delay was excused, but that if the proximate cause of the delay was not the unavoidable accident, but some other neglect on the part of the carrier, it was not excused. The issue in this case was not whether the carrier was negligent in its train schedules or in its care for the shipment other than in respect to the accidents referred to. The sole issue toward which the evidence was directed was whether or not the accidents which have been described,

prevented unloading within the time limit, and were unforeseeable in the exercise of due diligence and foresight. That these accidents were the cause of the failure to unload within the time limit, there can be no doubt. The Circuit Court of Appeals, however, would have the carrier prove to the satisfaction of the jury that its conduct of this shipment throughout was not negligent. We do not understand that kind of proof of want of negligence would exonerate the carrier from the duty of unloading the cattle within thirty-six (36) hours.

There was but one issue in the case, viz.: was the unloading prevented by one of the causes specified in the first section of the Act. The Circuit Court of Appeals recognizes that if it was, the delay was excused, but approves of an instruction of the trial court on the question of diligence which permitted the jury to find the defendant guilty upon an immaterial issue.

The Circuit Court of Appeals, while recognizing in its opinion that the words "knowingly and willfully" are in the statute, in effect ignores their presence there in the statement of the case. As we have already stated, it is not every violation of Section 1 that gives rise to an action for the penalties under Section 3, but only such violations as are *knowingly and willfully* committed.

As the Circuit Court of Appeals for the Eighth Circuit said:

"The qualifying words cannot be disregarded. They mean something, and whatever that may be is an essential element of every right to the penalty." (*St. Louis & Santa Fe Railway Company v. United States*, 169 Fed., 69-71.)

The Circuit Court of Appeals for the Seventh Circuit has itself recognized that there must be some evidence of knowledge and willfulness on the part of the carrier before recovery can be had. In the case of *St. Louis*

*Merchants Bridge Terminal Railway Company v. United States*, 209 Fed., 600, that court adopts the definition of "willfully" given by the Circuit Court of Appeals for the Eighth Circuit as meaning "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements," and the court in the case just cited says, page 602:

"We have searched this record in vain for any facts tending to show that plaintiff in error, knowingly and willfully violated the statute."

The words therefore cannot be disregarded in this case, and even conceding that there was evidence of a knowing violation of the provisions of Section 1, the evidence falls far short of disclosing any intention, or any flagrant disregard of the provisions of the law on the part of the railroad company which can be properly termed *willful*.

The case of *Chicago, Burlington & Quincy Railroad Company v. United States*, 194 Fed., 342, was cited and followed by the District Court of Massachusetts in the case of *United States v. Boston & Maine Railroad Company*, 228 Fed., 915. The overtime in that case was about seven hours and was caused by the engine developing a hot box, which required its being replaced by a second engine. This engine developed trouble in the boiler which also delayed it, although it had worked well on its previous trip.

In finding in favor of the defendant, the judge said:

"No reason is suggested why the defendant should have foreseen that the first engine was likely to develop a hot box which would necessitate withdrawing it *en route*, still less why it should anticipate that the second engine, which had worked well on its previous run, should suddenly develop a leaky

boiler. As I understand the facts, it was the failure of both of these engines, and not of one of them alone, which delayed the train so that delivery was impossible within the time limit.

I therefore find that the defendant was prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, from unloading the shipment of sheep in question."

### III.

#### THE INSTRUCTIONS.

The court in his instructions to the jury used the following language:

"The language of this statute providing for the limitation, and including the clause which provides the excuse for confinement in the case of confinement beyond the time fixed by the limitation says, in substance, that the carrier shall be excused when it is prevented from complying with the statute by storm or accidental and unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight. So, it presents to you the question for determination on this fact: Whether or not this car of stock by the exercise of due diligence by this railway company, the carrier, could have been transported from its point of origin out in Iowa, to destination, Union Stock Yards, within thirty-six hours. This inquiry is not merely whether or not, at Proviso, the thing was done which good railroading would require to be done to get this car, which the evidence shows was wrecked, back on the track and in condition to permit the movement; this inquiry is not merely whether or not, where this air hose broke, at Brighton Park, the railroad company did what a railroad company ought to do,—what good railroading requires to be done to reduce delay and provide movement at Brighton Park. Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence

in this case, you conclude that the railway company, by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the railway company."

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier."

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work, or the division superintendent's work, but the whole thing involved in the transaction or operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say, whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safeguards and in the way of provision to get stock

from origin to destination within the period of this statutory limit, the railroad company has to do. Of course, it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to destination something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six hour limit they are excused; that is not the law."

"But that is not the limit of your inquiry. You may consider the evidence in this case as to the movement of this stock from origin to destination, considering the entire time taken up at various places where the evidence shows there were stops, and you are authorized to find under the evidence whether if you please, it measures up to the standard of due diligence exercised by this defendant in accomplishing the thing with a view to obeying this law. You are authorized to find that the delay is excused by these two accidents. If you find on the evidence in this case that the accidents happened, and that the lost time they occasioned is as testified by the defendant's witnesses, that, as everything else in this matter in the way of evidence is for your ultimate determination."

The court by the instructions above quoted brought a new issue into the case and the only issue upon which the case could go to the jury. If the court is incorrect in these instructions in the particular hereinafter referred to, a verdict should have been directed for the defendant. The instruction practically amounts to this, that if the jury concluded that the railway company by the exercise of diligence could or would have transported the car from point of origin to destination inside of thirty-six hours, notwithstanding the delays to which the evidence was directed, they should find for the Government, even though the jury might be of the opinion that the delays explained by the evidence were properly handled by the railway company. In other words, that it was incumbent upon the railway to trace that shipment

from point of origin to destination and show that it moved promptly and without any delays, except such as are excusable under the law. The law does not place any such obligation upon the railroad company. It recognizes the fact that railroad companies have to make many stops to their trains. Frequently a freight train must be held on a siding to permit a passenger train to pass. It may be necessarily delayed for a variety of causes, none of which would be excusable under the law, but which could not reasonably be avoided in railroad operation. The law says, in effect, simply this, that the railroad company may arrange its own schedule, may operate its trains as it pleases, but that it must not confine stock on its cars in any case for a longer period than thirty-six hours. This has nothing to do with train movements. It has to do with the confinement of the stock. This makes it necessary, of course, that the railroad company should establish schedules which will either permit the stock to reach destination within the time limit for confinement, or permit their unloading into yards or pens where the stock may be rested, fed and watered for the requisite time. Having done this, the railway company may move its trains as it pleases. It must be apparent that this is the case, for otherwise a stock train could move only without delay, for a delay other than that excusable by the language of the act would be no defense to an action. The court's instruction would be more properly applicable to a case where damages were sought by the shipper by reason of delay than to the instant case. The instruction of the trial court would make defense of these cases impossible, and the language of the act "unless prevented by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight" become meaningless. If the court was wrong in this in-

struction, then, as above stated, the carrier has in this case completely exonerated itself from blame, for, applying the proper rule, it appears that the accident could not reasonably have been anticipated by the exercise of diligence and foresight; that the confinement was not wilful.

What has been said about the charge of the trial court applies with equal force to the decision of the Circuit Court of Appeals, for that court expressly approved of the giving of the instructions.

It is therefore submitted that the judgments of the Circuit Court of Appeals and of the District Court should be reversed.

Respectfully submitted,

WILLIAM G. WHEELER,

CHARLES A. VILAS,

*Counsel for Petitioner.*

APPENDIX.

---

“An Act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

*Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time dur-

ing which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with Section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food,

water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

SEC. 5. That Sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

Approved, June 29, 1906."



# In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHICAGO & NORTH WESTERN RAILWAY COMPANY, PETITIONER, v. THE UNITED STATES.	}	No. 250.
---	---	----------

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

The Circuit Court of Appeals for the Seventh Circuit affirmed a judgment for a penalty of \$100 for an alleged violation of what is known as the Twenty-eight Hour Law of June 29, 1906. (34 Stat., ch. 3594, p. 607; 234 Fed. 268.)

The statute forbids the confining in cars of cattle or other animals in interstate shipments for a longer period than 28 consecutive hours and requires the carrier, within that period, to unload them for rest and feeding, "*unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight,*" and except that the time of confinement

may, upon written request of the shipper, be extended to 36 hours. A carrier "knowingly and willfully" failing to comply is subject to a penalty.

*This case.* Here, cattle were carried in a special cattle train, without unloading, from Ringsted, Iowa, to the Union Stock Yards at Chicago, a distance of 438 miles. There was a proper 36 hours' request, but the cattle were confined 39 hours and 5 minutes.

*The defense.* There was no storm, and the defense was predicated alone on an effort to show that unloading within 36 hours was prevented by "accidental or unavoidable causes" which could not have been "anticipated or avoided by the exercise of due diligence and foresight." The contention is that there were two accidents which, together, caused delays amounting to 3 hours and 20 minutes, and but for which, it is said, the cattle would have been unloaded with 15 minutes to spare.

*The Government's* contention is (1) that the evidence fails to show 3 hours and 20 minutes' unavoidable delay, and (2) that if this had been shown there is ample evidence to justify a verdict that, notwithstanding this delay, with due diligence on the part of the carrier, the cattle could have reached their destination within the time prescribed by law.

*The evidence.* The train proceeded 300 miles to Clinton, leaving that point with 12 hours of the 36 hours period left in which to run the remaining 138 miles. The first accident occurred at Proviso, 16 miles from Union Stock Yards, when a drawbar pulled out, causing the derailing of a car. Only 3

hours and 12 minutes remained. It was necessary to call, by telegraph, a steam wrecker standing, with a full crew ready to start, 40 miles away. It started immediately upon being called, and the train proceeded after a delay of 2 hours and 52 minutes. But the wrecker was not called until 1 hour and 12 minutes after the accident occurred. And no effort was made to explain this delay.

The second accident occurred at Brighton Park,  $1\frac{1}{2}$  miles from the Union Stock Yards, where another drawbar pulled out, and there was a delay of 28 minutes.

The pulling out of drawbars is a very common occurrence in the running of trains. It often occurs without any apparent cause, and the consequent delays are to be anticipated on any long run.

There was evidence introduced by the carrier that the ordinary run from Clinton to Union Stock Yards was 9 hours, and that it was sometimes made in 6 hours. But this train in making it consumed 15 hours and 5 minutes, or, excluding the delays of 3 hours and 20 minutes, 11 hours and 45 minutes. And the time consumed in running the last 16 miles was 6 hours and 17 minutes, or, excluding the 3 hours and 20 minutes of delay, 2 hours and 57 minutes, although the 36-hours' limit had already been exceeded. And no effort was made to explain why such poor time was made on this part of the trip.

*Opinion of Circuit Court of Appeals.* In holding that the facts just stated furnished evidence sufficient

to take the case to the jury and to support the verdict, the Circuit Court of Appeals said:

In brief for plaintiff in error it is said:

"The train was in Proviso, 136 miles distant, at 2.48 in the morning, or 8 hours and 43 minutes after leaving Clinton, having traversed that distance at an average speed of 15.7 miles per hour. At that point, but a very few miles from the stockyards, they therefore had 4 full hours left."

But the stock was not unloaded till 9.05—6 hours 17 minutes after reaching Proviso, 16 miles away. Deducting 3 hours 20 minutes for the delays at Proviso and Brighton Park leaves 2 hours 57 minutes clear running time, which was consumed to make 16 miles, with a train carrying stock which had then already been confined 36 hours or more. The purpose of the law being, as declared in the act, "to prevent cruelty to animals while in transit," humanitarian considerations would suggest that, as the maximum period of confinement is approaching or passed, reasonable diligence on the carrier's part will require corresponding increase of effort to minimize further duration of the confinement.

The jury may have concluded that, conceding the delay of 3 hours 20 minutes as claimed, the consuming of 2 hours 57 minutes for a 16-mile run with stock which had already been confined by the same carrier since 6 o'clock p. m., of the second day before, manifested such a disregard for the statute as to afford sufficient evidence of its willful violation. We cannot say that a verdict so based

would be without evidence to support it, or a judgment given on such a verdict contrary to law. And, indeed, the jury might from the evidence have concluded that yet another hour was wasted at Proviso, at which station at 2.48 a. m., the car in the train was derailed. The wrecker was at Palatine with its crew ready to go out on any such emergency. But the foreman of the crew testified that he did not get notice till 4; that he started at once, reached proviso at 5.05, cleared the track at 5.30, so that at 5.40 the train proceeded. In these days of lightning communication, the jury might not improperly have found that under the circumstances ordinary care did not admit of such delay in calling the wrecker, and that such hour or so of the delay at Proviso was neither necessary nor unavoidable. (234 Fed. 268, 271.)

*The charge.* The only record of any exceptions to the charge is that, following certain portions of the charge set out in the bill of exceptions, this appears:

The COURT. Any exceptions?

Mr. WHEELER. Yes, your Honor. It is this, that this suit involves the train movement from point of origin to destination.

The COURT. You except to that part of the charge?

Mr. WHEELER. I do, and to that part of the charge where your Honor says that the railroad can not run its trains as it pleases with the idea that at the last moment of slipping in within the 36 hours and then because of some accident we can not get it.

The COURT. All right.

Mr. WHEELER. To those two parts.

The COURT. Yes.

And thereupon the defendant, by its counsel, duly excepted to the giving by the court to the jury of the foregoing instructions and each and every part thereof.

And thereupon the jury returned its verdict finding the defendant guilty, which is of record herein. (R. p. 31.)

#### QUESTIONS INVOLVED.

The questions involved are:

- (1) Was there evidence to support the verdict?
- (2) Were such exceptions taken as preserve the right to have any part of the charge reviewed?
- (3) If so, was there reversible error in the charge?

#### BRIEF OF ARGUMENT.

##### (1)

There was excess confinement of 3 hours and 5 minutes. The claim is that there should be deducted from the actual time 3 hours and 20 minutes of unavoidable delay, leaving the carrier 15 minutes to the good.

##### (2)

The fact that there has been an unavoidable delay does not afford exemption if it appears that notwithstanding such delay the carrier could, by proper foresight and diligence, have unloaded within the required time.

*Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U. S. 336.  
*Newport News, etc., v. United States*, 61 Fed. 480, 490.

(3)

The full 3 hours and 20 minutes can not be counted as excusable delay because—

1st. At least an hour was inexcusably wasted.

2d. At least 28 minutes of it consisted of loss from an accident of such common occurrence that it should have been anticipated.

(4)

On the carrier's own theory, then, it has failed to account for from three-quarters to  $1\frac{1}{4}$  hours.

(5)

There was evidence warranting the conclusion that, after the accident happened, the carrier needlessly consumed from an hour to  $1\frac{1}{2}$  hours in making the rest of the trip.

(6)

Under the circumstances, the confinement of the cattle for so long a time manifested that disregard of the law or indifference to its requirements which amounts to willfulness within the meaning of the statute.

This case, 234 Fed. 268, and cases cited.

*Spurr v. United States*, 174 U. S. 728.

*Armour Packing Co. v. United States*, 209 U. S. 56.

(7)

The exceptions are general and go to a portion of the charge which contains propositions of unques-

tioned correctness. They, therefore, can not be considered.

*Lincoln v. Claflin*, 7 Wall. 132.

*Anthony v. Louisville & Nashville R. R. Co.*,  
132 U. S. 172.

*Cooper v. Schlesinger*, 111 U. S. 148, 152.

*Mobile & Montgomery Ry. Co. v. Jurey*,  
111 U. S. 584, 596.

*Beckwith v. Bean*, 98 U. S. 266, 284.

*McNitt v. Turner*, 16 Wall. 352, 362.

*Hanna v. Maas*, 122 U. S. 24.

(8)

The portion of the charge excepted to is not erroneous.

#### ARGUMENT.

##### I.

#### VERDICT SUPPORTED BY EVIDENCE.

Very little of force can be added to what has already been quoted from the opinion of the Circuit Court of Appeals in holding that the verdict is supported by evidence.

It is conceded that the cattle were confined 3 hours and 5 minutes longer than the limit fixed by the statute. The claim is that 3 hours and 20 minutes of the time of confinement was consumed as the result of unavoidable accidents. And it is insisted that, counting out this time, the cattle were unloaded 15 minutes before the expiration of the 36 hours period.

But if we concede that this delay was unavoidable and could not have been anticipated, the defense is still not made out. Excess confinement is excused only if the unloading within the statutory period is, in fact, prevented by such an accidental cause. Manifestly if, notwithstanding a delay of this kind, the carrier could still, by due diligence and proper effort, have unloaded the cattle within 36 hours, it is not excused. Indeed, the happening of an accident which causes an unexpected delay itself imposes the duty of greater effort and diligence during the remainder of the journey than would otherwise be required by ordinary prudence. In view of such an accident, ordinary care and decent regard for the law require that every reasonable effort be exerted, first, to make the delay as brief as possible, and, second, to complete the trip in as short a time as possible. In short, an unavoidable accident can not be said to have prevented a proper unloading unless every reasonable effort has been made to minimize the consequences.

The question is, in principle, the same as that dealt with in *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U. S. 336. That case involved the Hours of Service Act, which contained this proviso:

*Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said em-

ployee left a terminal, and which could not have been foreseen.

Speaking of this proviso, the court (page 343) said:

It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States v. Dickson*, 15 Peters 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law.

Applying this view to the present case, it was the duty of the company, after the breakdown between Barstow and San Bernardino, to use all reasonable diligence to avoid the consequences of the unavoidable accidents which had delayed the movement of the train and to relieve the crew by the means practically at hand.

Manifestly, the same rules apply to the proviso now under consideration. The carrier can not claim exemption if the excess confinement is due to its own want of foresight and diligence, nor, in every case, where the law would have been complied with but for an unexpected accident. The foresight to be expected of an ordinarily prudent man experienced in railroad operation must be used in locating unloading facilities and in running a particular train. It is common knowledge that a train, on a long trip, can not be run continuously. Stops must be made

for coal and water, to permit the passing of trains, on account of minor accidents, or unfavorable weather, and for various other causes incident to ordinary railroad operation. Experience teaches that the exact amount of delay to be expected from such causes can not be accurately foretold. Particularly is it shown that the pulling out of a drawbar is of such common occurrence, one witness saying that it is of daily occurrence, that it is to be expected on almost any long run. If, therefore, a railroad locates its unloading facilities without making allowance for the delays thus to be reasonably anticipated, and so that the law can not be complied with unless conditions are perfect and only the very minimum of delays occur, it fails to exercise proper foresight, and, if a delay such as is not uncommon causes the run to exceed 36 hours, it is not excused.

Again, if proper allowance has been made for ordinary delays, but the carrier, without legal excuse, runs a cattle train so slowly over the first part of the trip as not to leave sufficient time to allow for like delays on the remainder of the trip, it can not claim exemption if one of those accidents likely to occur on any trip happens and results in excess confinement.

Likewise, if an accident occurs which, with reasonable diligence, can be remedied in a few minutes and the carrier permits a delay of several hours, the time thus wasted can not be excluded from the 36 hours of confinement permitted. And if, after an unavoidable delay has occurred, excess confinement may reasonably be avoided by increasing the speed or reducing the time lost by stops, there is no exemption.

Moreover, if such delays occur as will excuse some excess confinement, if the carrier prolongs this beyond what is reasonably necessary, it can not escape the penalty of the law.

Manifestly, then, to determine whether proper foresight and prudence have been exercised, the entire trip must be considered.

This, we believe, is the construction very generally placed by the courts on the statute ever since years ago it was stated by Judge Lurton in *Newport News, etc., Co. v. United States*, 61 Fed. 488, 490, in this language:

Congress did not mean that simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show, not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law.

In the present case, it is insisted by the carrier that—

The issue in this case was not whether the carrier was negligent in its train schedules or in its care for the shipment other than in respect to the accidents referred to. (Brief, p. 19.)

In other words, the contention is that if an unavoidable delay equal to the time of excess confinement is shown, there is no liability regardless of anything else that may appear. But even if this was the true rule, the verdict would still rest upon ample evidence. The utmost that is claimed is that two accidents caused a delay of 3 hours and 20 minutes, and that, excluding all of this time, the cattle were unloaded 15 minutes to the good. But it must be conceded that even where a train is stopped by an unavoidable accident, the carrier must use reasonable diligence to get it started without unnecessary delay. It can not neglect the means at hand to overcome the consequences of the accident. It can claim exemption for only so much time as is reasonably necessary for the effective use of these means. Surely there can be no serious insistence that it can claim credit for time deliberately wasted.

In this case when the accident happened the carrier had 16 miles to run and 3 hours and 12 minutes left. The cattle had then been confined nearly 33 hours. It was at once apparent that a wrecker would have to run 42 miles, requiring about an hour, and that at least another half hour would be required to start the train. The telegraph was at

hand, and the wrecker was ready. Prompt action would have started the train with about an hour and a half to run 16 miles. It had run 422 miles in a fraction less than 33 hours, or at the rate of a little less than 13 miles per hour. If no time was wasted in getting started, the same rate of speed would have taken it in within the 36 hours. But, with knowledge of all these things, the carrier sat by and did nothing for an hour and 12 minutes, when it finally used the telegraph, which should have been used at once, and ordered out the wrecker. No excuse is offered for this delay, and it can not be regarded as anything but a deliberate wasting of at least an hour of time. This reduces the time claimed as an unavoidable delay to 2 hours and 20 minutes, and if that be excluded there would still be 45 minutes of excess confinement.

But, even allowing credit for the full 2 hours and 52 minutes lost as a result of the first accident, there was still evidence from which the jury could find that there was excess confinement. In order to come within the 36 hours the carrier adds to this 2 hours and 52 minutes the 28 minutes lost as a result of the second accident, which was an ordinary pulling out of a drawbar. But we have seen that the occasional pulling out of a drawbar is one of the things which a carrier must always anticipate. We may assume that the resulting derailment of a car or the pulling out of an unusual number of drawbars is not to be anticipated. But if we deduct from the actual running time the delay incident to

the first accident, nothing else which should not have been anticipated occurred. And, allowing the full time claimed for the first accident, but disallowing that claimed for the second as being only one of the common occurrences in the operation of trains, there would still be an excess confinement of 13 minutes.

In still another view there was evidence to support the verdict. When the train left Proviso all of the 36 hours had been consumed except 20 minutes. There was, therefore, excess confinement during practically the whole of the remaining 16 miles. If this excess time was excusable at all, it was so only to the extent of the time reasonably necessary to make the run. Even excluding the full 3 hours and 20 minutes claimed, the carrier consumed 2 hours and 57 minutes in running 16 miles, making only a fraction over 5 miles an hour. To determine whether this much time was reasonably necessary the jury was warranted in looking at the whole trip. It thus appeared that the first 300 miles of the trip were made in 24 hours, or at the rate of  $12\frac{1}{2}$  miles per hour. The next 122 miles were made in 8 hours and 48 minutes, or at the rate of 13.8 miles per hour. The carrier made no effort to show that there were any conditions which would require a lower rate of speed for the remaining 16 miles. The only other evidence throwing any light on what time would be reasonably necessary was that offered by the carrier to the effect that the ordinary run from Clinton to Union Stock Yards was 9 hours, making

the rate  $15 \frac{3}{9}$  miles per hour, and that it had been made in 6 hours, or at the rate of 23 miles per hour. This was a through cattle train, and had no local work to do. These facts furnish ample evidence for the inference that 5 miles per hour was an unreasonably slow rate to run a train carrying cattle already excessively confined, and that, with due diligence, the train should have been run at least 12 miles per hour, after excluding the delays claimed. This would have required  $1 \frac{1}{3}$  hours for the trip instead of practically 3 hours. There was, therefore, something like  $1 \frac{1}{2}$  hours of unnecessary excess confinement.

There was, therefore, evidence to justify the finding that (1) a material part of the excess time was wasted at Proviso and (2) proper diligence in running from Proviso would have saved a very considerable part of the time actually consumed in making the run.

It is said, however, that the facts do not make a case of "willful" failure to comply with the law. On this point the Circuit Court of Appeals, citing cases decided by numerous other Circuit Courts of Appeals, said:

That the term "willfully," as employed in the act, does not imply deliberate intent to do injury to the stock or to its owner has been too frequently considered and definitely determined to require further demonstration. The jury may conclude that the violation was willful, if from the evidence they find that the carrier in confining the stock beyond the statutory limit manifested disregard of the law,

or indifference toward its requirements. (234 Fed. 268, 269.)

This is in accord with the principle announced by this court in construing the word "wilful" in the National Banking Laws, thus:

If an officer certifies a cheque with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact. (*Spurr v. United States*, 174 U. S. 728, 735.)

See also *Armour Packing Co. v. United States*, 209 U. S. 56.

## II.

### EXCEPTIONS TO THE CHARGE.

It is at least doubtful whether the exceptions to the charge raise any question which an appellate court can be called on to review.

The bill of exceptions sets out the portion of the charge excepted to, covering nearly two printed pages. This is followed by what purports to be a stenographic report of a colloquy between court and counsel. This apparently indicates a purpose to except to the portion of the charge which (1) permits "the train movement from point of origin to destination" to be considered, and (2) "says that

the railroad can not run its trains as it pleases with the idea that at the last moment of slipping in within the 36 hours and then because of some accident we can not get it." But counsel himself seems not to have considered what was stated in this colloquy to have been a full or accurate statement of his exception, for he immediately formulated it thus:

And thereupon the defendant, by its counsel, duly excepted to the giving by the court to the jury of the foregoing instructions and each and every part thereof. (R. 31.)

The scope of the exception must, therefore, be determined from the language just quoted. Plainly it is an exception to every part of the "foregoing" instructions as set out in the bill of exceptions. It follows that if any proposition contained in these instructions was correct, the exception was wholly unavailing. *Lincoln v. Claflin*, 7 Wall. 132, 139; *Anthony v. Louisville & Nashville R. R. Co.*, 132 U. S. 172; *Cooper v. Schlesinger*, 111 U. S. 148, 152; *Mobile & Montgomery Ry. Co. v. Jurey*, 111 U. S. 584, 596; *Beckwith v. Bean*, 98 U. S. 266, 284; *McNitt v. Turner*, 16 Wall. 352, 362; *Hanna v. Maas*, 122 U. S. 24.

Looking at the instructions, we find that they contain (R. p. 30) a definition of "due diligence," which counsel do not and can not question, and (R. p. 31) a statement in effect that such delay as the jury may find resulted from the two accidents described in the evidence was excusable. The instructions called in question, therefore, contained at least two correct propositions.

## III.

## NO ERROR IN THE CHARGE.

But if the exceptions can be treated as raising only the points indicated by the colloquy, the charge was not erroneous. These exceptions were disposed of by the Circuit Court of Appeals thus:

In considering the question of whether all or any of the overtime of confinement was made necessary by the proved delays, and whether in the exercise of due diligence the carrier could have brought the stock to the unloading point in materially less than the time here in question, it was entirely proper for the jury to consider the confinement and transportation of this stock from inception to unloading, and this only is what the court's charge, which is complained of, told the jury it might do. (234 Fed. 268, 271.)

It may be that, in looking at the entire trip, there is no evidence of a want of foresight and care up to the time the train reached Clinton or Proviso. But, as we have seen, the details of that part of the trip furnished material evidence on the question of the reasonableness of the time consumed in running the last 16 miles. Hence, the charge not only announced sound principles of law, but was strictly pertinent to the evidence.

## IV.

In conclusion, the carrier was under the double duty to exercise such *foresight* in laying out and making its runs that, taking into consideration ordinary delays, it could reasonably expect to comply with the law and, after the occurrence of an unexpected delay,

to use *diligence* to minimize the consequences of such delay. We have seen that, after the accident at Proviso, this carrier deliberately wasted at least an hour. This itself is sufficient to warrant the verdict. In addition, we have seen that the fair inference from such evidence as the carrier submitted was that 2 hours and 57 minutes actual running or, including 28 minutes resulting from such an accident as is always to be anticipated, 3 hours and 25 minutes, was an unreasonable time to be consumed in running 16 miles and showed a gross want of diligence. But if this inference was not warranted, and even if it appeared that there were conditions on account of which this much time was ordinarily required, the plight of the carrier would be no better. It would still be guilty of wasting an hour at Proviso. And it would be in the position of having exercised such poor foresight in running its train to Proviso as to leave only 3 hours and 12 minutes for a run which would, without even an ordinary accident, require 2 hours and 57 minutes, and which in the event of a drawbar pulling out, a thing always to be anticipated and which did occur, would require 3 hours and 25 minutes and result in a failure to comply with the statute. It would thus stand convicted of a want of both foresight and diligence.

It is respectfully submitted that there is no error in the judgment and that it should be affirmed.

WILLIAM L. FRIERSON,  
*Assistant Attorney General.*

S. MILTON SIMPSON,  
*Attorney.*

March, 1918.

## CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 250. Argued March 27, 28, 1918.—Decided April 15, 1918.

The "28 Hour Law," forbidding interstate railroads from confining animals in cars beyond a certain period without unloading them for rest, water and feeding, unless prevented by accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, and subjecting every such carrier who knowingly and wilfully fails to comply therewith to a penalty, must be construed with a view to carrying out its humanitarian purpose, but the exception in favor of the carrier must be given proper latitude and enforced in the light of practical railroad conditions.

If, in the exercise of ordinary care, prudence and foresight, the carrier reasonably expects that, following the determined schedule, the containing car will reach destination, or some unloading place, within the prescribed time, it properly may be put in transit. Thereafter, the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt, to prevent accidents and delays and to overcome the effect of any which may happen, with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

234 Fed. Rep. 268, reversed.

THE case is stated in the opinion.

*Mr. Charles A. Vilas*, with whom *Mr. William G. Wheeler* was on the brief, for petitioner.

*Mr. Assistant Attorney General Frierson*, with whom *Mr. S. Milton Simpson* was on the brief, for the United States:

There was excess confinement of 3 hours and 5 minutes. The claim is that there should be deducted from the

actual time 3 hours and 20 minutes of unavoidable delay, leaving the carrier 15 minutes to the good. The fact that there has been an unavoidable delay does not afford exemption if it appears that notwithstanding such delay the carrier could, by proper foresight and diligence, have unloaded within the required time. *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U. S. 336; *Newport News &c. v. United States*, 61 Fed. Rep. 480, 490.

The full 3 hours and 20 minutes cannot be counted as excusable delay because, first, at least an hour was inexcusably wasted, and second, at least 28 minutes of it consisted of loss from an accident of such common occurrence that it should have been anticipated. On the carrier's own theory, then, it has failed to account for from  $\frac{3}{4}$  to  $1\frac{1}{4}$  hours. There was evidence warranting the conclusion that, after the accident happened, the carrier needlessly consumed from an hour to  $1\frac{1}{2}$  hours in making the rest of the trip. Under the circumstances, the confinement of the cattle for so long a time manifested that disregard of the law or indifference to its requirements which amounts to wilfulness within the meaning of the statute. This case, 234 Fed. Rep. 268, and cases cited; *Spurr v. United States*, 174 U. S. 728; *Armour Packing Co. v. United States*, 209 U. S. 56.

The exceptions are general and go to a portion of the charge which contains propositions of unquestioned correctness. They, therefore, cannot be considered. *Lincoln v. Claffin*, 7 Wall. 132, and other cases. But the portion excepted to is not erroneous.

The carrier was under the double duty to exercise such foresight in laying out and making its runs that, taking into consideration ordinary delays, it could reasonably expect to comply with the law and, after the occurrence of an unexpected delay, to use diligence to minimize the consequences of such delay. After the accident at Proviso, this carrier deliberately wasted at least an hour.

This itself is sufficient to warrant the verdict. In addition, the fair inference from such evidence as the carrier submitted was that 2 hours and 57 minutes actual running or, including 28 minutes resulting from such an accident as is always to be anticipated, 3 hours and 25 minutes, was an unreasonable time to be consumed in running 16 miles and showed a gross want of diligence. But if this inference was not warranted, and even if it appeared that there were conditions on account of which this much time was ordinarily required, the plight of the carrier would be no better. It would still be guilty of wasting an hour at Proviso. And it would be in the position of having exercised such poor foresight in running its train to Proviso as to leave only 3 hours and 12 minutes for a run which would, without even an ordinary accident, require 2 hours and 57 minutes, and which in the event of a drawbar pulling out, a thing always to be anticipated and which did occur, would require 3 hours and 25 minutes and result in a failure to comply with the statute. It would thus stand convicted of a want of both foresight and diligence.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Charging violation of the Act of June 29, 1906, 34 Stat. 607, to prevent cruelty to animals while in transit, the United States sued petitioner for the prescribed penalty and recovered a judgment in the District Court, Northern District of Illinois, which the Circuit Court of Appeals affirmed. 234 Fed. Rep. 268.

The statute forbids an interstate railroad carrier from confining animals in cars longer than thirty-six hours, upon written request, without unloading them for rest, water and feeding "unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and

foresight;" and subjects every such carrier "who knowingly and willfully fails to comply" therewith to a penalty. Admitting continuous confinement for more than thirty-six hours petitioner defended upon the ground that it was prevented from unloading within the required period by exculpatory accidental and unavoidable causes.

It appeared: The animals were loaded at Ringsted, Iowa, four hundred and thirty-eight miles from destination,—Union Stock Yards, Chicago—at six P. M. October 4th, and as part of a train the car containing them left Clinton, Iowa, one hundred and thirty-eight miles from Chicago, at six P. M. October 5th. The ordinary schedule time between the latter points is nine hours, but without increase of actual moving speed the run had been made in about six. While the train was passing through Proviso, sixteen miles from destination, at 2:48 A. M. October 6th, a drawbar came out and derailed a car. A delay of two hours and fifty-two minutes followed—not undue the carrier contends, but unreasonably long the Government maintains. Later, at Brighton Park an air hose burst causing further delay of twenty-eight minutes. The car reached the stock yards at 9:05 A. M. October 6th—thirty-nine hours and five minutes after being loaded.

In its charge to the jury the trial court said:

"Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company, by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company.

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier.

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work or the division superintendent's work, but the whole thing involved in the transaction of operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safe guards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to desti-

nation something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six limit they are excused; that is not the law."

The statute must be construed with a view to carrying its humanitarian purpose into effect and the exception in favor of the carrier given proper latitude and enforced in the light of practical railroad conditions. Nothing indicates the running schedule was unduly slow; and the jury were improperly given to understand that, conceding matters were properly handled when accidents occurred at Proviso and Brighton Park, they might nevertheless decide the railroad could have got the car to destination within thirty-six hours if due diligence had been exercised in laying out such schedule. The definition of "due diligence" in the charge was too exacting and misleading. As applied to the facts due diligence did not require, as the court declared, that "whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safe guards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do."

We find nothing in the act indicating a purpose to interfere directly with the carrier's discretion in establishing schedules for trains; the design was to fix a limit beyond which animals must not be confined, whatever the schedule, except under the extraordinary circumstances stated. In general, unloading can only take place at specially prepared places or final destination. If in the exercise of ordi-

nary care, prudence and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

In the Hours of Service Act, 34 Stat. 1415-1416, there is a proviso "that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. . . ." Construing this, in *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U. S. 336, 343, we said: "It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States v. Dickson*, 15 Pet. 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law." This general principle should also be followed in construing and applying the provision of the statute here under consideration.

The judgment below is reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

*Reversed and remanded.*